TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, FORMERLY KNOWN AS THE FARMERS LOAN AND TRUST COMPANY, AS ADMINISTRATOR, ETC., PETITIONER,

vs.

GEORGE T. McGOWAN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-EIGHTH COLLECTION DISTRICT, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 27, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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Burrell T. Cappon,

Direct 47

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

1

CITY BANK FARMERS TRUST COMPANY, formerly known as THE FARMERS LOAN AND TRUST COMPANY, as Administrator of the Goods, Chattels and Credits of HELEN HALL VAIL, Deceased,

Plaintiff-Appellant,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-eighth Collection District, New York,

Defendant-Appellee.

2

Statement Under Rule XIII

This action was commenced by the service of a summons and complaint upon the defendant-appellee on or about March 6, 1939. The names of the original parties to this action are stated in the title hereof and no additional or other parties have become parties before this appeal and there has been no change in any of the parties.

The complaint was filed on or about March 6, 1939; the answer was filed on or about January 19, 1940.

There was no arrest, bail or attachment and no proceedings thereunder.

3

Trial of the action was had without a jury on May 6th and 7th, 1941, before the Hon. John Knight, one of the judges of the United States District Court for the Western District of New York.

No question was referred to a commissioner or commissioners; master or referee.

The final judgment was made and entered in the Office of the Clerk of the United States District Court for the Western District of New York on May 14, 1943.

This appeal was taken from said judgment by the filing of a notice of appeal on August 9, 1943, and by the filing of the necessary bond for costs, pursuant to Rule 73 of the Federal Rules of Civil Procedure.

4

Complaint.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

Complaint at Law

No. Civ. 131

CITY BANK FARMERS TRUST COMPANY, formerly known as THE FARMERS LOAN AND TRUST COMPANY, as Administrator of the Goods, Chattels and Credits of HELEN HALL VAIL, Deceased,

5 Plaintiff,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-eighth Collection District, New York,

Defendant.

The plaintiff above named, appearing herein by its attorneys, Montgomery, Peabody, Grace & Derby, for its complaint, respectfully shows upon information and belief:

6 1. That the plaintiff, City Bank Farmers Trust Company, formerly known as The Farmers Loan and Trust Company, is a domestic corporation, having its principal place of business at No. 22 William Street, Borough of Manhattan, City of New York. On the 29th day of June, 1929, by certificate duly filed in the Office of the Secretary of State of the State of New York, the plaintiff's name was changed from The Farmers Loan and Trust Company to City Bank Farmers Trust Company.

2. That at all times hereinafter mentioned, from and after August 25, 1933, the defendant, George T. McGowan,

was and still is the Collector of Internal Revenue for the Twenty-Eighth United States Collection District, New York, and resides therein.

3. That on February 10, 1936, Letters of Administration of all the goods, chattels and credits of Helen Hall Vail, deceased, were duly granted and issued to the plaintiff by the Surrogate's Court of the County of Ontario, State of New York, and plaintiff duly qualified as such Administrator and at all times since has acted and is now acting as such.

4. That previous to her death and on or about the 12th day of August, 1926, the said Helen Hall Vail, pursuant to proceedings in the Supreme Court of the State of New York, a court of competent jurisdiction, was duly adjudged to be an incompetent person, incapable of managing herself and her affairs, and thereafter on or about the 25th day of August, 1926, the plaintiff, then known as The Farmers Loan and Trust Company, was duly appointed by a commission, issued out of the said Court, Committee of the Property and Estate of the said Helen Hall Vail; that the plaintiff thereafter duly qualified and acted as such Committee of the Property and Estate of the said Helen Hall Vail until the 27th day of December, 1935, when the said Helen Hall Vail died intestate.

5. That following the appointment of City Bank Farmers Trust Company as Committee of the Property and Estate of said Helen Hall Vail, her daughter MaBelle H. Plumb petitioned the Supreme Court of the State of New York for allowances to herself and others out of the surplus income of the said incompetent person and pursuant to proceedings duly had, wherein it was found that the incompetent when sane was accustomed to make gifts to her children and relatives, for purposes associated with life, and

that such allowances would have been made by her had she been in possession of her faculties, an order was therein duly made by said court on the 14th day of January, 1927, whereby the said Committee of the Property and Estate of Helen Hall Vail was directed, among other things, to pay out of the surplus income of said incompetent person each year in equal quarterly payments, the following sums to the following named persons:

To MaBelle Houghton Plumb, a daughter of said
11 incompetent person, the sum of Fifty Thousand ($50,000) Dollars.

To Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of said incompetent person, the sum of Fifty Thousand ($50,000) Dollars.

To Edward Hegeman Hall, a brother of said incompetent person, the sum of Two Thousand ($2,000) Dollars.

To Mary Hall Taft, a sister of said incompetent person, the sum of Three Thousand ($3,000) Dollars.

12 To Elizabeth Hall Burdick, a sister of said incompetent person, the sum of Two Thousand ($2,000) Dollars.

To Abbe Ferrin, a sister of said incompetent person, the sum of Two Thousand ($2,000) Dollars.

To Lucy Hall Ferris, a sister of said incompetent person, the sum of Two Thousand ($2,000) Dollars.

A copy of said order of the Supreme Court of the State of New York, dated January 14, 1927, is annexed hereto and made a part hereof and marked Exhibit "A".

6. That thereafter, by her petition verified the 26th day of April, 1932, the said MaBelle H. Plumb petitioned the Supreme Court of the State of New York for an increase in the amount of the allowances theretofore made to herself and Ieuan Harris, as general guardian of John H. Harris, William R. Harris and David F. Harris, the minor grandchildren above named of the said Helen Hall Vail, and pursuant to proceedings duly had upon said petition, wherein the court found that such increases would have been made by the said Helen Hall Vail if in possession of her faculties, an order was therein duly made by said court on the 3rd day of June, 1932, whereby the said Committee of the property of said Helen Hall Vail, an incompetent person, was directed to pay out of the income of said incompetent person received by it in each quarter, in addition to the amounts paid by said Committee of the property under said order dated January 14, 1927, provided that there should be sufficient surplus income at the end of each quarter so to do, after deducting all other payments for that quarter, the following sums to the following named persons:

> To said MaBelle Houghton Plumb the sum of Six Thousand Two Hundred and Fifty ($6,250) Dollars.
>
> To said Ieuan Harris, as General Guardian as aforesaid, the sum of Six Thousand Two Hundred and Fifty ($6,250) Dollars.

7. That said order of June 3, 1932, by its terms was made retroactive and further directed the said Committee of the Property to pay out of the accumulated surplus income of said incompetent person then in its possession, to said MaBelle Houghton Plumb and said Ieuan Harris, as General Guardian as aforesaid, the sum of One Hundred Thirty-one Thousand Two Hundred and Fifty ($131,250) Dollars each, as and for a payment of $25,000 per annum for the

16 *Complaint.*

five calendar years last past and of Six Thousand Two Hundred and Fifty ($6,250) Dollars as and for the quarterly installment due March 31, 1932, of the additional allowances granted by said order of June 3, 1932. A copy of said order of the Supreme Court of the State of New York, dated June 3, 1932, is annexed hereto and made a part hereof and marked Exhibit "B".

8. That pursuant to said two orders of the Supreme Court of the State of New York, respectively dated January 14, 1927 and June 3, 1932, and from January 14, 1927, the
17 date of the first of said orders, to December 27, 1935, the date of death of said Helen Hall Vail, an incompetent person, plaintiff, as Committee of the Property of said Helen Hall Vail, an incompetent person, paid out of her surplus income to the persons therein named, allowances aggregating the sum of One Million Three Hundred Seventy-seven Thousand Eight Hundred Sixty-six and 67/100 Dollars ($1,377,866.67), a schedule of which is hereto annexed, marked Exhibit "C".

9. That on or about the 9th day of May, 1933, upon the application of City Bank Farmers Trust Company (for-
18 merly The Farmers Loan and Trust Company), permission was granted to it by an order duly made by the Supreme Court of the State of New York in New York County to account as Committee of the Property and Estate of said Helen Hall Vail, an incompetent person, and in conformity therewith, the plaintiff as such Committee duly filed an account of its proceedings for the period from August 12, 1926 to July 1, 1933, which embraced and reflected all payments made during said period by said Committee of the Property pursuant to said orders granting allowances of January 14, 1927 and of June 3, 1932; that a special guardian was appointed by the court to protect the rights and

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interest of the Incompetent, and pursuant to proceedings duly had, a judgment of the Supreme Court of the State of New York, dated the 19th day of February, 1934, was duly made and entered wherein and whereby it was, among other things, ordered, adjudged and decreed that the payments made by the Committee of the Property of the said incompetent person, as set forth in its accounts, be approved, ratified and confirmed.

10. That the said Helen Hall Vail died on or about the 27th day of December, 1935 and thereafter, upon application of City Bank Farmers Trust Company as Committee 20
of her property and estate, permission was granted by an order of the Supreme Court of the State of New York, duly made and dated the 30th day of June, 1936, to said Committee to make and render its final account as Committee of the Property of the deceased incompetent person; that in conformity therewith the Committee filed an account of its proceedings for the period from July 1, 1933 to December 27, 1935, the date of death of said Helen Hall Vail, which said account embraced and reflected all payments made by the Committee of the Property during said period, pursuant to said two orders granting allowances; that the order granting permission to the Committee to account 21
directed that notice of the filing of the account be given to all persons interested in the deceased incompetent person's estate and notice having been duly given in conformity with the directions of said order, such proceedings were thereupon duly had that thereafter and on or about the 9th day of December, 1936, a final judgment was therein duly made and entered by said court, wherein and whereby it was, among other things, ordered, adjudged and decreed that the payments made by the Committee of the Property of the said deceased incompetent, as set forth in said account, be approved, ratified and confirmed.

22 *Complaint.*

11. That on or about January 27, 1937, plaintiff, as administrator of all the goods, chattels and credits of Helen Hall Vail, deceased, caused to be filed in the Office of the defendant at Buffalo, New York, pursuant to the Revenue Act of 1926 and the Revenue Act of 1932, as amended, an Estate Tax Return on Form 706. In Schedule E of said return, plaintiff, as such administrator, set forth the aggregate amount of the allowances paid pursuant to the said orders of January 14, 1927 and June 3, 1932, to wit: the sum of $1,377,866.67, for information purposes only, and
23 filed with said Estate Tax Return copies of said two orders but plaintiff did not include the said amount in computing the Estate Tax payable and plaintiff did not then, nor does it now, admit that said allowances or any part thereof constituted transfers made by the decedent during her life, to be included in decedent's gross estate either under any provision of any Revenue Act, or otherwise.

12. That thereafter, plaintiff as such administrator was advised by Treasury Department letter dated April 5, 1938, a copy of which is annexed and marked Exhibit "D", of a deficiency in Federal Estate Tax liability, as computed in the Return made by the plaintiff, and of the Government's
24 claim to an additional tax, upon the ground that the aggregate amount of the allowances paid as aforesaid were properly includible in the decedent's gross estate under the provisions of Section 302-c of the Revenue Act of 1926, as amended.

13. That plaintiff protested against the additional tax proposed but its protest was overruled and thereafter, in the month of June, 1938, the defendant, the said George T. McGowan, acting as Collector of Internal Revenue for the said Twenty-eighth Collection District of New York, demanded of plaintiff as such administrator the sum of Four Hundred Thirty-six Thousand Thirty-one and 67/100 Dollars ($436,031.67) as and for a deficiency in the amount of

taxes payable and paid by plaintiff as administrator, on account of its Federal Estate Tax liability, together with interest in the amount of Thirty Thousand Eight Hundred Eighty and 60/100 Dollars ($30,880.60), which sums defendant as such Collector claimed to be then due and payable from plaintiff as such administrator, under and pursuant to the provisions of Section 302-c of the Revenue Act of 1926, as amended.

14. That plaintiff, solely in order to avoid the imposition of penalties and interest and the distraint and sale of the property in its custody as such administrator, and under compulsion, duress and coercion, paid to the defendant, as such Collector, on or about the 22nd day of June, 1938, the said sum of Four Hundred Thirty-six Thousand Thirty-one and 67/100 Dollars, together with the said sum of interest amounting to Thirty Thousand Eight Hundred Eighty and 60/100 Dollars (30,880.60), and plaintiff, as such administrator, at the time of said payments, protested in writing to the defendant that no deficiency existed in the amount of the sums payable and paid by it on account of its Federal Estate Tax liability and that the assessment of said tax and the said tax, together with the interest thereon, were erroneous and illegal and that payment thereof was made solely to prevent the imposition of penalties threatened and the attachment of property.

15. That thereafter, and on or about July 8, 1938, plaintiff, as such administrator, duly appealed to the Commissioner of Internal Revenue by filing with the defendant a claim for the refund of the alleged deficiency in Federal Estate Tax and interest thereon, paid as alleged in the preceding paragraph, upon the ground that the payments made as aforesaid pursuant to said court orders were not transfers in contemplation of death and were not and are not within the purview and scope and meaning of Section 302-c

28 *Complaint.*

of the Revenue Act of 1926, as amended; and upon the further ground that, inasmuch as testamentary motive, which is essential to a gift in contemplation of death, cannot by any provision of positive law be attributed to a person who has been adjudged to be incompetent, a tax based upon a presumption so arbitrary and opposed to fact illegally deprived the distributees of this estate of their property without due process of law guaranteed under the Constitution of the United States and its amendments.

16. That said claim for refund was thereafter and on or
29 about July 28, 1938, wholly rejected and denied in writing by the Commissioner of Internal Revenue, upon the ground that the said transfers were made in contemplation of the decedent's death and the value of the property transferred had been properly included in the decedent's gross estate under the provisions of Section 302-c of the Revenue Act of 1926.

17. That the orders of the Supreme Court of the State of New York, pursuant to which the said transfers were made, did not purport to execute and did not execute, on behalf of the said Helen Hall Vail, any gift in contemplation of her death or transfer in the nature thereof; that
30 the transfers aforesaid were not within the scope and purview of Section 302 (c) of the Act of Congress, known as the Revenue Act of 1926, as amended, as said Act was, upon its enactment, intended to be construed and interpreted; that the construction and interpretation by the Commissioner of Section 302 (c) of the said Revenue Act of 1926, as amended, as applicable to the transfers aforesaid, was erroneous and illegal, in that such construction and interpretation attributed testamentary motive to the said Helen Hall Vail, who had been judicially declared an incompetent person, and to the aforesaid orders of the Supreme Court of the State of New York, made on her behalf.

31

18. That the said Helen Hall Vail was incapable of possessing or exercising any intent whatsoever. That Section 302 (c) of Title 3 of the Act of Congress known as the Revenue Act of 1926, as amended, is unconstitutional and void in so far as the same may be asserted to confer power to make said assessment against plaintiff and compel payment thereof for the reason that testamentary motive essential to a gift in contemplation of death cannot be attributed validly by legislative act to persons who have been adjudged incompetent to manage themselves and their affairs; that, so construed, it is arbitrary, capricious, confiscatory, discriminatory and admits of assumptions which are contrary to fact, and by said Act and by the assessment and collection by the defendant of the tax paid thereon as hereinbefore alleged, the plaintiff, as Administrator of the Estate of the said Helen Hall Vail, and the distributees of her estate, have been denied the equal protection of the laws and wrongfully and illegally deprived of their property in violation of the Constitution of the United States and the Fifth Amendment thereof, which provides that no person shall be deprived of property without due process of law.

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19. That the orders granting the allowances out of said Helen Hall Vail's income were made pursuant to the inherent jurisdiction over the property and affairs of incompetents of the Supreme Court of the State of New York, which is a branch of the Government of the State of New York. The said court, through its agent, the Committee of said incompetent's property, had custody of the incompetent's funds and it made the said transfers from its said custody to the recipients. The tax imposed and collected by the defendant herein was levied, not upon the property so transferred, but upon the transfer itself, made by the court. Section 302 (c) of Title 3 of the Act of Congress known as the Revenue Act of 1926, as amended, is unconstitutional and void in so far as the same may be asserted to confer power to make said assessment and compel the

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34 *Complaint.*

payment of said tax for the reason that, so construed, it constitutes an illegal interference by the United States with a necessary, proper, important and inherent function of the sovereign State of New York, in violation of the Tenth Amendment and other provisions of the Constitution of the United States.

20. That this is an action at law and the matters in controversy in this action and the cause of action hereinabove set forth arise under the Constitution of the United States and the laws of the United States providing for internal
35 revenue.

WHEREFORE, plaintiff, as administrator of the goods, chattels and credits of Helen Hall Vail, deceased, avers that defendant has erroneously and illegally demanded and collected estate taxes from the plaintiff, based upon the unlawful and illegal inclusion in the gross estate of the said decedent of the value of said transfers made pursuant to orders of the Supreme Court of the State of New York, as hereinabove alleged, and plaintiff demands judgment against the defendant for the sum of Four Hundred Sixty-six Thousand Nine Hundred Twelve and 27/100 Dollars ($466,912.27), with interest thereon from the 22nd day of
36 June, 1938, together with the costs and disbursements of this action.

MONTGOMERY, PEABODY, GRACE & DERBY,
By JAMES LLOYD DERBY,
J. SEYMOUR MONTGOMERY, JR.,
Members of the firm
Attorneys for Plaintiff,
Office and P. O. Address,
One Cedar Street,
Borough of Manhattan,
City of New York, N. Y.

(Verified by P. A. Miller, a trust officer of plaintiff.)

Exhibit "A" Annexed to Complaint.

37

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 14th day of January, 1927.

Present: Honorable Richard P. Lydon, Justice.

In the Matter

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of

the application of MaBelle Houghton Plumb for an allowance to be paid herself and others from the income accruing each year to Helen Hall Vail, an incompetent person.

On reading and filing the petition herein of MaBelle Houghton Plumb, applying for an allowance each year out of the income of Helen Hall Vail an incompetent person, for herself and others, and the cross-petition of The Farmers' Loan and Trust Company, as Committee of the Property of Helen Hall Vail an incompetent, asking for the instruction of this Court as to relief prayed for in said petition, and upon the Order of Reference herein, entered in the Office of the Clerk of the County of New York on the 26th day of November, 1926, wherein and whereby the matter was referred to Philip J. Dunn, Esquire, of the City of New York, as sole referee, to take proof of the facts alleged in the petition and to report to the Court, with all convenient speed upon the matters referred to him by the order, with his opinion, and the

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said petitioner MaBelle Houghton Plumb, by Messrs. Montgomery, Peabody & Grace, her attorneys, having duly moved for the confirmation of the said Referee's Report, and the other parties hereto having duly waived further notice of said motion, and said The Farmers' Loan and Trust Company as Committee as aforesaid, having duly appeared upon such motion by Messrs. Geller, Rolston & Blanc, its attorneys, and having submitted the interests of the incompetent to the protection of the Court, and Ieuan Harris as General Guardian of
41 John H. Harris, William R. Harris and David F. Harris, infants, having duly apeared upon said motion by Messrs. Dean, King & Smith their attorneys, and having submitted the interests of his wards to the protection of the Court, and due deliberation having been had thereon, and

ON READING and FILING the affidavit of Philip J. Dunn, Esquire, the Referee, the affidavit of John S. Montgomery, Esquire, a member of the firm of Montgomery, Peabody & Grace, the attorneys for the petitioner, MaBelle Houghton Plumb, the affidavit of Frederic P. King, Esquire, a member of the firm of Dean, King & Smith, the attorneys for Ieuan Harris, General Guardian of John H. Harris,
42 William R. Harris and David F. Harris, infants, and the affidavit of Charles Angulo, Esquire, a member of the firm of Geller, Rolston & Blanc, the attorneys for the Farmers' Loan and Trust Company as Committee of the Property of Helen Hall Vail, an incompetent, with respect to the services rendered by each of them in this proceeding, and

ON READING and FILING the testimony taken at said hearing and the report of the said Referee, and it appearing to my satisfaction that the income of the said incompetent for the last four or five years has averaged over Three Hundred Thousand Dollars, and that to maintain

Exhibit "A", Annexed to Complaint.

and support the incompetent, and to care for her property, there cannot reasonably be expended a greater sum than Fifty Thousand Dollars, and that the said Helen Hall Vail has not made a last will and testament and that the said MaBelle Houghton Plumb, the only surviving child of said incompetent, or her issue, and the said John H. Harris, William R. Harris and David F. Harris, the three children of a deceased daughter of said incompetent, or their issue, will be, upon the death of said incompetent, the only heirs-at-law and next-of-kin of said incompetent, and the only persons entitled to share in her estate, and this Court having found and hereby finding, upon the evidence submitted before said Referee and to this Court, that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property.

NOW ON MOTION of MONTGOMERY, PEABODY & GRACE, attorneys for said petitioner, and no one appearing in opposition thereto, it is

ORDERED that the report of said Referee be and the same is hereby in all respects confirmed, it is

FURTHER ORDERED that The Farmers' Loan and Trust Company as Committee of the Property of Helen Hall Vail an incompetent person, pay out of the income of the said incompetent, each year in equal quarterly payments the following sums to the following named persons

To MABELLE HOUGHTON PLUMB, the petitioner, the daughter of said incompetent, the sum of Fifty Thousand ($50,000.) Dollars,

46 *Exhibit "A", Annexed to Complaint.*

To Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of Fifty Thousand ($50,000.) Dollars,

To Edward Hageman Hall, the brother of the incompetent, the sum of Two Thousand Dollars,

To Mary Hall Taft, a sister of the incompetent, the sum of Three Thousand Dollars,

47 To Elizabeth Hall Burdick, a sister of the incompetent, the sum of Two Thousand Dollars,

To Abbe Ferrin, a sister of the incompetent, the sum of Two Thousand Dollars,

To Lucy Hall Ferris, a sister of the incompetent, the sum of Two Thousand Dollars, and it is

Further ordered that the said The Farmers' Loan and Trust Company as Committee of the Property of the incompetent, pay out of the income in its hands the fol-
48 lowing sums

To Philip J. Dunn, Esquire, the Referee, the sum of Three Thousand and Five Hundred Dollars, as and for the allowance to which he is entitled, for his services herein

To Montgomery, Peabody & Grace, as attorneys for MaBelle Houghton Plumb, the petitioner, the sum of Five Thousand Dollars, as and for the allowance to which they are entitled, for their services herein, together with the sum of Two hundred and seventy-eight 90/100—to cover their disbursements herein

Exhibit "A", Annexed to Complaint.

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To Dean, King & Smith, as attorneys for Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of One Thousand and Five Hundred Dollars, as and for the allowance to which they are entitled, for their services herein

To Geller, Rolston & Blanc, as attorneys for The Farmers' Loan and Trust Company, as Committee of the Property of Helen Hall Vail the incompetent, the sum of One Thousand Dollars, as and for the allowance to which they are entitled, for their services herein, and it is

50

Further ordered that if upon the death of Helen Hall Vail, the incompetent, it shall appear that the total allowances received by MaBelle Houghton Plumb, and the total aggregate allowances received by the said three grandchildren, John H. Harris, William R. Harris, and David F. Harris, or their guardian, Ieuan Harris, for their account, shall not be equal to each other, that the excess received by either MaBelle Houghton Plumb, or the said three grandchildren, or their guardian, shall be considered as an advancement, and it is

51

Further ordered that the application of the said Committee for instructions be and the same is hereby granted and that said Committee be and is hereby instructed to make the payments hereinbefore specified as the Committee of the said incompetent's property.

Enter

R. P. L.
J. S. C.

52 **Exhibit "B" Annexed to Complaint.**

At a Special Term, Part 1 of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 3rd day of June, 1932.

Present: Honorable PHOENIX INGRAHAM, Justice

53 IN THE MATTER

of the

Application of MaBelle Houghton Plumb for an additional allowance to be paid to herself and others from the income received by the City Bank Farmers Trust Company, as Committee of the Property of

HELEN HALL VAIL,

an incompetent person.

54 ON READING AND FILING the amended petition of MABELLE HOUGHTON PLUMB praying for an additional yearly allowance of $25,000.00 for herself and for Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants and further praying that said allowance be made retroactive for five years and that said additional allowances for the past five years amounting to $25,000 each year be paid out of the accumulated surplus income in the possession of the said Committee, $125,000.00 to the petitioner and $125,000.00 to said Ieuan Harris as such Guardian, and

Exhibit "B", Annexed to Complaint.

55

ON READING the answer of Cornelius J. Smyth, the Special Guardian duly appointed by this Court by an Order dated the 4th day of May, 1932, to protect the interests of the said incompetent, which said Order dispensed with service of all papers in this proceeding upon the incompetent, the answer of the City Bank Farmers Trust Company as Committee of the property of the incompetent Helen Hall Vail, by Taylor, Blanc, Capron & Marsh, its attorneys, and the Answer of Ienan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants by Dean, King, Smith & Taylor, his attorneys, and an Order having been duly entered in this Court on the 4th day of May, 1932, appointing Townsend Morgan, Esquire, Referee to hear and take testimony of the respective parties and to report to his Court with his opinion with all convenient speed, and

56

ON READING the report of the said Referee dated the 25th day of May, 1932, heretofore duly filed herein, wherein he recommends that allowances be granted as prayed for, and

ON READING the report of the Special Guardian heretofore duly filed herein, and

57

ON READING the testimony taken at said Hearing from which it appears that there is accumulated income in the possession of the Committee of an inventoried value of $1,051,078.56, and whereas from the said testimony it appears that the income for the past five and one-half years has averaged about $395,000.00 a year, and the surplus income after paying all expenses, including allowances heretofore granted by the Order of January 14th, 1927, and paying all expenses, and etc. on account of the incompetent for her care and maintenance averaged about $191,105.18 a

58 *Exhibit "B", Annexed to Complaint.*

year, and it further appearing that said Helen Hall Vail is seventy-seven years of age and will not recover from the disease from which she is suffering and that her only issue is the petitioner, MaBelle Houghton Plumb and her son, Joseph H. Plumb, Jr., and the three infants, John H. Harris, William R. Harris and David F. Harris, children of a deceased daughter of the incompetent, and that said Helen Hall Vail has not made her Last Will and Testament, and that upon the death of the said incompetent the only persons entitled to share in her estate will be the said
59 MaBelle Houghton Plumb the only surviving child of said incompetent and her son, Joseph H. Plumb, Jr., and the said John H. Harris, William R. Harris and David F. Harris the three children of a deceased daughter of said incompetent, or their issue, and this Court having found upon the evidence submitted before the said Referee and to this Court, that if the said incompetent, Helen Hall Vail, were in possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowances to such persons out of her property, and

60

ON READING the affidavit of John S. Montgomery, Esquire, a member of the firm of Montgomery, Peabody & Grace, the attorneys for the petitioner, and the affidavit of Cornelius J. Smyth, Esquire, Special Guardian of the incompetent, the affidavit of Townsend Morgan, Esquire, Referee, the affidavit of Frederick P. King, Esquire, a member of the firm of Dean, King, Smith & Taylor, the attorneys for Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, infants and the affidavits of Charles Angulo, Esquire, a member of the firm of Taylor, Blanc, Capron & Marsh, attorneys for the City Bank Farmers Trust Company as Committee

61

of the property of the incompetent, with respect to the services rendered by each of them in this proceeding, and no objection having been made except by the City Bank Farmers Trust Company as Committee of the Property, and

ON READING AND FILING proof of service of the Notice of Settlement of this Order upon all the parties who have appeared herein,

NOW ON MOTION OF MONTGOMERY, PEABODY & GRACE, attorneys for said petitioner, it is

62

ORDERED that the CITY BANK FARMERS TRUST COMPANY as Committee of the Property of Helen Hall Vail, an incompetent person pay out of the income received by it in each quarter, on the last day of the quarter, to wit: the last days of March, June, September and December in each year, in addition to the amounts paid by it under the Order of this Court dated the 14th day of January, 1927, provided that there be sufficient surplus income at the end of each quarter so to do, after deducting all other payments for that quarter, the following sums to the following named persons—

63

TO MABELLE HOUGHTON PLUMB, the petitioner, the daughter of said incompetent, the sum of SIX THOUSAND TWO HUNDRED AND FIFTY ($6,250) DOLLARS;

TO IRVAN HARRIS, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of SIX THOUSAND TWO HUNDRED AND FIFTY ($6,250.00) DOLLARS; and it is further

ORDERED that out of the surplus income now in its possession that the City Bank Farmers Trust Company as

64 *Exhibit "B", Annexed to Complaint.*

Committee of the property of Helen Hall Vail an incompetent person pay

To MaBelle Houghton Plumb, the petitioner, the sum of One Hundred and Thirty-One Thousand Two Hundred and Fifty Dollars ($131,250.00) representing a payment of Twenty-five Thousand Dollars ($25,000) per annum, for the past five years, and of Six Thousand Two Hundred and Fifty Dollars ($6,250), being the quarterly installment due March 31st, 1932, of additional allowances
65 as above ordered, and

To Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of One Hundred and Thirty-One Thousand Two Hundred and Fifty Dollars ($131,250.00), representing a payment of Twenty-five Thousand Dollars ($25,000) per annum for the past five years, and of Six Thousand Two Hundred and Fifty Dollars ($6,250) being the quarterly installment due March 31st, 1932, of additional allowances as above ordered, and it is further

66 Ordered that the said City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail, an incompetent person, pay out of the income in its possession the following sums—

To Townsend Morgan, Esquire, the Referee, the sum of Five Thousand Dollars, as and for the allowance to which he is entitled, for his services herein;

To Cornelius J. Smyth, Esquire, the Special Guardian of the incompetent person, the sum of Sixty Five Hundred Dollars, as and for the allowance to which he is entitled, for his services herein;

Exhibit "B", Annexed to Complaint.

67

To Montgomery, Peabody & Grace, as attorneys for MaBelle Houghton Plumb, the petitioner, the sum of Sixty Five Hundred Dollars, as and for the allowance to which they are entitled, for their services herein, together with the sum of Two Hundred Dollars, to cover their disbursements herein;

To Dean, King, Smith & Taylor, as attorneys for Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of Twenty Five Hundred Dollars, as and for allowance to which they are entitled, for their services herein; 68

To Taylor, Blanc, Capron & Marsh, as attorneys for The City Bank Farmers Trust Company, as Committee of the property of Helen Hall Vail the incompetent, the sum of Twenty Five Hundred Dollars, as and for the allowance to which they are entitled, for their services herein, and it is further

Ordered that if upon the death of Helen Hall Vail the incompetent, it shall appear that the total allowances received by MaBelle Houghton Plumb, and the total aggregate allowances received by the said three grandchildren, John H. Harris, William R. Harris and David F. Harris, or their guardian, Ieuan Harris for their account, shall not be equal to each other, that the excess received by either MaBelle Houghton Plumb, or the said three grandchildren, or their guardian, shall be considered as an advancement, and it is further 69

Ordered that for the purpose of raising sufficient cash with which to make the payments hereinbefore directed to be made at this time, said City Bank Farmers Trust

70 *Exhibit "B", Annexed to Complaint.*

Company as Committee of the property as aforesaid, sell forthwith the following securities, at the prices set opposite the same below, or better, and that it expend the net proceeds thereof in making said payment after having applied thereto any cash income now in its hands available for that purpose.

List of property to be sold by the Committee of the property of the Incompetent at the prices listed opposite the same or better.

71 $30,000. par value City of Cleveland, Ohio, Water Works 4½s due 12/1/36 @ 93

10,000. par value City of Kansas City, Missouri, Missouri River Bridge Gold Bonds, Series 21, 4¼s due 4/1/49 @ 92

20,000. par value registered City of Minneapolis permanent improvement 4s, due 9/1/46 @ 90

10,000. par value City of Mt. Vernon North Fourth Avenue widening 3¾s due 10/1/42 @ 81

30,000. par value City of Mt. Vernon North Fourth
72 Avenue widening 3¾s due 10/1/43 @ 81

5,000. par value City of New Rochelle, New York, Municipal Improvement Bonds, Series of 1929 4¼s due 5/1/37 @ 91

5,000. par value of City of New Rochelle, New York, School Board, Series of 1929, 4¼s due 5/1/37 @ 91

12,000. City of New York Corp. Stock to provide for supply of water 4¼s due 3/1/64 @ 75

51,000. City of New York Corp. stock for construction of rapid transit railway 4¼s due 3/1/81 @ 75

Exhibit "B", Annexed to Complaint.

73

18,000. City of Trenton, New Jersey, Series A 363 General Improvement Funding Bonds of 1929 4¼s due 2/1/39 @ 90

35,000. State of New Jersey State Highway Bd. Act. of 1927 Series A 4¼s due 7/1/44 @ 95

12,000. par value State of West Virginia Roads Series A 1931, 3½s due 6/1/50 @ 82

30,000. State of West Virginia Roads, Series A, 1931 3½s due 6/1/54 @ 82

74

And if the net proceeds of the foregoing should prove insufficient, then also, in so far as required to make up the deficiency the following—

$25,000. Cuyohoga County, Ohio, Jail and Court House Buildings, 4¼s due 4/1/45 @ 84

10,000. City of Newark, New Jersey, Port Newark Improvement 4¼s due 8/1/43 @ 86

1,000. City of Newark Market House, 4½s due 12/1/48 @ 84

16,000. County of Hudson, New Jersey Park Bonds 4s due 11/1/54 @ 72 75

4,000. County of Hudson, New Jersey Park Bonds 4s due 5/1/54 @ 72

Enter,

P. I.
J. S. C.

76

Exhibit "C" Annexed to Complaint.

SCHEDULE OF ALLOWANCES PAID OUT OF THE SURPLUS INCOME OF HELEN HALL VAIL, AN INCOMPETENT PERSON, PURSUANT TO THE ORDERS OF THE SUPREME COURT OF THE STATE OF NEW YORK, DATED JANUARY 14, 1927, AND JUNE 3, 1932, RESPECTIVELY

1927		
Mar. 31	Mary Hall Taft	$ 750.00
	Elizabeth Hall Burdick	500.00
	Abbe Ferrin	500.00
	Lucy Hall Ferris	500.00
77	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
July 2	Elizabeth Hall Burdick	500.00
	Lucy Hall Ferris	500.00
	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Mary Hall Taft	750.00
	Abbe Ferrin	500.00
78 Sept. 30	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Mary Hall Taft	750.00
	Elizabeth Hall Burdick	500.00
	Lucy Hall Ferris	500.00
Oct. 21	New Rochelle Trust Co., Executor estate Abbe Hall Ferrin, being amount of quarterly payment accrued to Sept. 6, 1927, date of death	366.67

Exhibit "C", Annexed to Complaint. 79

1928		
Jan. 3	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Mary Hall Taft	750.00
	Elizabeth Hall Burdick	500.00
	Lucy Hall Ferris	500.00
Mar. 30	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Mary Hall Taft	750.00
	Elizabeth Hall Burdick	500.00
	Lucy Hall Ferris	500.00
June 29	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Mary Hall Taft	750.00
	Elizabeth Hall Burdick	500.00
	Lucy Hall Ferris	500.00
Sept. 29	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Mary Hall Taft	750.00
	Elizabeth Hall Burdick	500.00
	Lucy Hall Ferris	500.00
Dec. 31	MaBelle Houghton Plumb	12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00
	Edward Hageman Hall	500.00
	Elizabeth Hall Burdick	500.00
	Mary Hall Taft	750.00
	Lucy Hall Ferris	500.00

80

81

82 *Exhibit "C", Annexed to Complaint.*

1929			
Mar. 30	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
June 29	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian		
83	of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
Sept. 30	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
84 Dec. 31	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
1930			
Mar. 30	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00

Exhibit "C", Annexed to Complaint.

1930			85
Mar. 30	Edward Hageman Hall	500.00	
	Mary Hall Taft	750.00	
	Elizabeth Hall Burdick	500.00	
	Lucy Hall Ferris	500.00	
June 30	MaBelle Houghton Plumb	12,500.00	
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	
	Edward Hageman Hall	500.00	
	Mary Hall Taft	750.00	
	Elizabeth Hall Burdick	500.00	86
	Lucy Hall Ferris	500.00	
Sept. 30	MaBelle Houghton Plumb	12,500.00	
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	
	Edward Hageman Hall	500.00	
	Mary Hall Taft	750.00	
	Elizabeth Hall Burdick	500.00	
	Lucy Hall Ferris	500.00	
Dec. 31	MaBelle Houghton Plumb	12,500.00	
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	
	Edward Hageman Hall	500.00	87
	Mary Hall Taft	750.00	
	Elizabeth Hall Burdick	500.00	
	Lucy Hall Ferris	500.00	
1931			
Mar. 31	MaBelle Houghton Plumb	12,500.00	
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	
	Edward Hageman Hall	500.00	
	Mary Hall Taft	750.00	
	Elizabeth Hall Burdick	500.00	
	Lucy Hall Ferris	500.00	

88 *Exhibit "C", Annexed to Complaint.*

1931			
June 30	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
Sept. 30	MaBelle Houghton Plumb		12,500.00
89	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
Dec. 31	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Elizabeth Hall Burdick		500.00
	Lucy Hall Ferris		500.00
90 1932			
Mar. 31	MaBelle Houghton Plumb		12,500.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Lucy Hall Ferris		500.00
Apr. 2	Elizabeth Hall Burdick		500.00
June 21	MaBelle Houghton Plumb pursuant to order of Supreme Court, New York County, dated June 3, 1932		131,250.00

Exhibit "C", Annexed to Complaint.

91

1931			
22	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris a/c of $131,250. due pursuant to order of Supreme Court, New York County, dated June 3, 1932		95,000.00
30	Lucy Hall Ferris		500.00
	Mary Hall Taft		750.00
	Edward Hageman Hall		500.00
July 1	MaBelle Houghton Plumb, a/c of $12,500. due June 30, 1932, pursuant to order of Supreme Court, New York County, dated January 14, 1927		8,385.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, a/c of $12,500. due June 30, 1932 pursuant to order of Supreme Court		8,385.00
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, pursuant to order of Supreme Court, New York County, dated June 3, 1932, balance of $131,250		36,250.00
28	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, balance due on payment of June 30, 1932	$4,113.00	
	Additional allowance per Court Order dated June 3, 1932	6,250.00	10,365.00
	MaBelle Houghton Plumb, balance due on payment of June 30, 1932	4,115.00	
	Additional allowance per Court Order dated June 3, 1932	6,250.00	10,365.00

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94 *Exhibit "C", Annexed to Complaint.*

1932			
Sept. 30	MaBelle Houghton Plumb		18,750.00
30	Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris		18,750.00
30	Edward Hageman Hall		500.00
	Lucy Hall Ferris		500.00
	Mary Hall Taft		750.00
Dec. 31	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		18,750.00
95	MaBelle Houghton Plumb		18,750.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Lucy Hall Ferris		500.00
1933			
Mar. 31	Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris		18,750.00
	MaBelle Houghton Plumb		18,750.00
	Edward Hageman Hall		500.00
	Mary Hall Taft		750.00
	Lucy Hall Ferris		500.00
96 July 1	MaBelle Houghton Plumb		18,750.00
	Ieuan Harris, general guardian of John H., William R. and David F. Harris		18,750.00
Oct. 2	As of September 30, 1933, paid MaBelle Houghton Plumb		18,750.00
	As of September 30, 1933, paid Ieuan Harris, general guardian of John H., William R. and David F. Harris		18,750.00
	Mary Hall Taft		750.00
	Edward Hageman Hall		500.00
	Lucy Hall Ferris		500.00

Exhibit "C", Annexed to Complaint.

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1933			
Dec. 30	Lucy Hall Ferris	500.00	
	Edward Hageman Hall	500.00	
	Ieuan Harris, general guardian of John H., William R. and David F. Harris	18,750.00	
	MaBelle Houghton Plumb	18,750.00	
1934			
Mar. 31	Edward Hageman Hall	500.00	
	Lucy Hall Ferris	500.00	
	Ieuan Harris, general guardian of John H., William R. and David F. Harris, per decree of Supreme Court 1/14/27	18,750.00	98
	MaBelle Houghton Plumb	18,750.00	
June 30	Lucy Hall Ferris	500.00	
	Edward Hageman Hall	500.00	
	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00	
	MaBelle Houghton Plumb	18,750.00	
Sept. 29	Edward Hageman Hall	500.00	
	Lucy Hall Ferris	500.00	
	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00	
	MaBelle Houghton Plumb	18,750.00	99
Dec. 31	Lucy Hall Ferris	500.00	
	Edward Hageman Hall	500.00	
	MaBelle Houghton Plumb	18,750.00	
	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00	
1935			
Mar. 30	Lucy Hall Ferris	500.00	
	Edward Hageman Hall	500.00	
	MaBelle Houghton Plumb	18,750.00	
	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00	

100 *Exhibit "D", Annexed to Complaint.*

1935		
June 29	Lucy Hall Ferris	500.00
	Edward Hageman Hall	500.00
	MaBelle Houghton Plumb	18,750.00
	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
Sept. 30	Lucy Hall Ferris	500.00
	Edward Hageman Hall	500.00
	MaBelle Houghton Plumb	18,750.00
101	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
		$1,377,866.67

Exhibit "D" Annexed to Complaint.

80M Rev. June, 1934

Apr 5 1938

MT—ET—CI—4169—28th New York
Estate of Helen Hall Vail
Date of death—December 27, 1935

102 City Bank Farmers Trust Company, Administrator,
22 William Street,
New York, New York.

Sirs:

A deficiency of $645,654.48 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926

Exhibit "D"; Annexed to Complaint.

as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) D. S. BLISS
D. S. Bliss,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890.

JFM:SKB

106 *Exhibit "D", Annexed to Complaint.*

MT—ET—4169—28th New York
Estate of Helen Hall Vail
Date of death—December 27, 1935

STATEMENT

The protest relates to the following items:

GROSS ESTATE

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Transfers	*Returned*	*Tentatively Determined*	*Determined*
Payments made from the decedent's estate pursuant to the orders of the Supreme Court of New York, dated January 14, 1927, and June 3, 1932	$ 0.00	$1,377,866.67	$1,377,866.67

After a careful review of all of the evidence of record it is held that the above transfers were properly included
108 in the decedent's gross estate under the provisions of section 302 (c) of the Revenue Act of 1926, as amended.

DEDUCTIONS

Debts of decedent:

Item 2	23,153.39	23,153.39	31,038.30
Item 3	30,000.00	30,000.00	40,653.[illegible]

The above items under debts of decedent have been increased to cover the additional amounts paid subsequent to the filing of the return.

Exhibit "D", Annexed to Complaint.

109

The following tabulation shows the Federal estate tax liability of this estate which is hereby made final:

Gross estate		3,781,604.15
Deductions, 1926 Act		585,533.21
Net estate, 1926 Act		3,196,070.94
Net estate, 1932 Act		3,256,070.94
Gross tax, 1926 Act	$ 262,028.51	
Credit for estate or inheritance taxes	0.00	
Net tax, 1926 Act		262,028.51
Total gross taxes, 1926 and 1932 Acts	1,065,271.21	
Gross tax, 1926 Act	262,028.51	
Additional tax		803,242.70
Total net tax		$1,065,271.21
Amount assessed on return		419,616.73
Deficiency		$ 645,654.48

110

111

No credit is allowed for either gift tax or State estate, inheritance, legacy or succession taxes at this time as the gift tax has not been finally determined and the inheritance tax credit evidence has not been submitted.

The deficiency bears interest at the rate of six per cent per annum from fifteen months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

112 **Defendant's Motion to Dismiss Complaint.**

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

YOU WILL PLEASE TAKE NOTICE that, upon the complaint herein, a motion will be made at a term of this Court to be held in and for the Western District of New York, at the Courthouse thereof, Niagara Square, Buffalo, New
113 York, on the 28th day of August, 1939, at ten o'clock in the forenoon of said day (Eastern Daylight Saving Time), or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein on the ground that the same fails to state facts sufficient to constitute a cause of action, and for such other, further and different relief as to the Court may seem just in the premises.

Dated, Buffalo, N. Y., August 7, 1939.

Yours, &c.,

GEORGE L. GROBE,
United States Attorney in and for
114 the Western District of New York,
Attorney for Defendant,
Office & P. O. Address,
502 United States Courthouse,
Buffalo, New York.

TO:

MONTGOMERY, PEABODY, GRACE & DERBY, Esqs.,
Attorneys for Plaintiff,
1 Cedar Street,
New York, N. Y.

WELLES V. MOOT, Esq.,
302 Erie County Bank Building,
Buffalo, New York.

Order Denying Motion to Dismiss Complaint 115

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

A motion having been made herein by the defendant to dismiss the complaint on the ground that the same fails to state facts sufficient to constitute a cause of action, and said motion having duly come on to be heard upon the 116
complaint herein, and the notice of motion herein, dated August 7, 1939, and after hearing Robert M. Hitchcock, Esq., Assistant United States Attorney, of counsel for the defendant in support of said motion, and James Lloyd Derby and Frederick P. King, Esqs., of counsel for the plaintiff in opposition thereto, and due deliberation having been had, and it appearing to the satisfaction of this Court that the complaint states a claim as required by the Federal Rules of Civil Procedure, and this Court having handed down an opinion directing that the motion be denied, it is

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ORDERED that said motion to dismiss the complaint herein be and the same is hereby in all respects denied.

IT IS FURTHER ORDERED that the defendant may have twenty days after the service of a copy of this order with notice of entry in which to answer the complaint herein.

Dated, Buffalo, New York,
January 2nd, 1940.

JOHN KNIGHT
United States District Judge

118 **Opinion of Judge John Knight on Order Denying Motion to Dismiss Complaint**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

119

MONTGOMERY, PEABODY, GRACE & DERBY; for Plaintiff; Frederick P. King and Hines, Rearick, Dorr & Hammond, of Counsel.

GEORGE L. GROBE, United States Attorney; Robert M. Hitchcock, Assistant United States Attorney; for Defendant.

KNIGHT, District Judge:

The Complaint and the briefs submitted by the respective parties on this motion to dismiss the complaint have
120 been examined with care, and it seems that this motion must at this time be denied. The question of the financial need of the donees may be an important question in connection with the effect of the substantial appropriation made by the court out of the estate of the incompetent. The matter of such need was not a jurisdictional fact requiring a recital in the order. Neither the petitions on which the orders were made nor the testimony taken by the Referee is before the court.

The question of prior gifts, and the amount of these, if any, made by deceased while competent, may, also, be a relevant inquiry.

Opinion of Judge John Knight on Order Denying Motion to Dismiss Complaint. 121

The claim is made that, since the argument of the government is not directed to certain allowances made to collateral relatives, the motion must be denied. If the court were to find no distinction between the effect of gifts to collaterals and to direct heirs, this point would be immaterial.

December 21, 1939

JOHN KNIGHT
United States District Judge 122

123

124 **Answer**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

The above named defendant, by his attorney, George L. Grobe, United States Attorney in and for the Western District of New York, as and for his answer to the complaint herein, alleges upon information and belief:

125 I. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs numbered "3", "4", "5", "6", "7", "8", "9" and "10" thereof, and so much of "14" thereof as alleges that plaintiff "solely in order to avoid the imposition of penalties and interest, and the distraint and sale of the property in its custody as such administrator, and other compulsion, duress and coercion, paid * * *."

II. Denies each and every allegation contained in paragraphs numbered "17", "18" and "19" thereof.

WHEREFORE, defendant demands judgment dismissing
126 the complaint with costs.

Dated, Buffalo, N. Y., January 18, 1940.

/s/ George L. Grobe,
GEORGE L. GROBE,
United States Attorney in and for
the Western District of New York,
Attorney for Defendant,
Office and P. O. Address,
502 United States Courthouse,
Buffalo, New York.

(Verified by George L. Grobe, United States Attorney for the Western District of New York.)

Plaintiff's Notice to Admit Facts

127

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that pursuant to Rule 36 of the Federal Rules of Civil Procedure the undersigned hereby 128
call upon you for the admission by you of the truth of the following matters relevant to the above entitled action:

1. That Helen Hall Vail, mentioned in paragraph marked "3" and subsequent paragraphs of the complaint herein, died on December 27, 1935.

2. That the plaintiff above named duly qualified and acted as Committee of the Property and Estate of said Helen Hall Vail until December 27, 1935.

3. That the said Helen Hall Vail from and after August 12, 1926, when plaintiff was appointed Committee of her Property, was herself incapable of pos- 129
sessing or exercising any intent whatsoever down to the time of her death.

Dated, April 24, 1941.

Yours, etc.,

MONTGOMERY, PEABODY, GRACE & DERBY,
Attorneys for Plaintiff,
Office and P. O. Address,
One Cedar Street,
Borough of Manhattan,
City of New York, N. Y.

130 *Affidavit of Assistant U. S. Attorney Robert M. Hitchcockwith Respect to Notice to Admit Facts.*

To:

GEORGE L. GROBE, Esq.,
United States Attorney,
Attorney for Defendant,
502 United States Court House,
Buffalo, New York.

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131 **Affidavit of Assistant U. S. Attorney Robert M. Hitchcock with Respect to Notice to Admit Facts.**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

Western District of New York
County of Erie } ss:
132 City of Buffalo

ROBERT M. HITCHCOCK, being duly sworn, deposes and says that he is an Assistant United States Attorney in and for the Western District of New York and as such has represented the defendant herein throughout the above captioned litigation.

That with respect to the notice to admit facts, dated April 24, 1941, and pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant is unable to either admit or deny the truth of the three alleged facts contained in said notice.

Affidavit of Assistant U. S. Attorney Robert M. Hitchcock with Respect to Notice to Admit Facts.

That deponent knows nothing with respect to the first and second of said alleged facts except upon hearsay, although deponent has no basis whatsoever for denying the truth of the said facts.

That with respect to the third alleged fact, deponent can neither admit nor deny the same by reason of his complete ignorance of the mental condition of said Helen Hall Vail between August 12, 1926 and the date of her death, although deponent assumes by reason of hearsay information contained in the records of the New York State Supreme Court, examined in the files of the County Clerk of New York County, that said Helen Hall Vail was adjudicated an incompetent on or about August 12, 1926 and was, at that time at least, incapable of managing herself and her estate.

(Sworn to by Robert M. Hitchcock on April 28, 1941.)

136 **Testimony.**

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

Tried before Hon. John Knight, United States District Judge, held at the United States Court House, Buffalo, New York, beginning May 6, 1941, at 10:00 A. M.

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APPEARANCES:

Messrs. MONTGOMERY, PEABODY, GRACE & DERBY, Attorneys for the Plaintiff, by James Lloyd Derby, Esq., and J. Seymour Montgomery, Jr., Esq., of Counsel. (One Cedar St., N. Y. City.)

Messrs. MOOT, SPRAGUE, MARCY & GULICK, Attorneys for Plaintiff, by Welles V. Moot, Esq., of Counsel. (Erie County Bank Bldg., Buffalo, N. Y.)

Messrs. HINES, REARICK, DORR & HAMMOND, Attorneys for Plaintiff, by John K. Watson, Esq., and Paul Smith,
138 Esq., of Counsel. (61 Broadway, New York City).

Messrs. DEAN, KING, SMITH & TAYLOR, Attorneys for Plaintiff, by Frederick P. King, Esq., of Counsel. (55 Liberty St., New York City.)

Hon. GEORGE L. GROBE, United States Attorney, Attorney for the defendant, by Robert M. Hitchcock, Esq., Assistant United States Attorney.

Mr. Hitchcock: Solely for the purpose of the record, I renew my motion made in June or July of 1939, to dis-

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miss the complaint by reason of the failure of the parties to prove the facts which constituted their cause of action and which was denied by your Honor, and I respectfully except to your Honor's denial of my motion now.

BURRELL T. CAPPON, sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Moot:

140

Q. Mr. Cappon, you are Clerk of the Surrogate's Court of Ontario County? A. Yes.

Q. That is at Canandaigua? A. Yes.

Mr. Hitchcock: What do you propose to prove by this witness?

The Court: You made a motion a while ago and I will pass on your motion. I didn't pass upon it then. I will deny your motion.

Mr. Hitchcock: I respectfully except to your Honor's denial of my motion, in view of your previous decision.

141

The Court: I recall no action was taken.

Mr. Hitchcock: I except.

Mr. Moot: Now, your question.

Mr. Hitchcock: I want to know what you propose to prove by it?

Mr. Moot: I propose to offer in evidence the return appraiser's report, taxing order, and receipt for the tax, on file in the Surrogate's office, Ontario County, in the New York State tax proceedings in the Estate of Mrs. Vail.

Mr. Hitchcock: I respectfully object to any such offer on the ground that it is incompetent and

142 *Burrell T. Cappon—For Plaintiff—Direct.*

immaterial, and irrelevant, and on the further ground it is res inter alois acta.

Mr. Moot: I stated the basis on which it is offered, on which this offer was being made. I stated it before, your Honor, and it is simply this; it will appear from the return, if the return is in evidence here, that the return is identical with the return filed in the Federal proceedings. The New York State Law is identical with the Federal Statute. It is also our contention that the Transfer Tax Ap-
143 praiser and taxing officer makes his report to the Surrogate's Court and the Surrogate in a judicial capacity, first as a pro forma matter, makes his order confirming this report, and then, if no objections are filed, and no hearing is asked for, that order becomes the final judicial determination of the amount of the tax.

(Discussion off the record.)

Mr. Moot: I am willing to have your Honor reserve decision on this question, if you wish.

144 The Court: I have doubt about its admissibility, in view of your concession—but I will receive it, and simply reserve decision on it.

Mr. Hitchcock: I respectfully except to your Honor's ruling at this time.

The Court: I will pass on it. All right.

Mr. Moot: I would be glad to submit memoranda to your Honor on that basis.

Mr. Hitchcock: So that there will be no further interruption, my objections and exceptions are taken to any of the offers of reports in evidence, or anything in the Surrogate's Court of Ontario County. I assume your Honor will rule that it

145

isn't necessary for me to continue to make those objections?

The Court: Yes, that is right.

By Mr. Moot:

Q. Have you the return in the Vail Estate? A. Yes.

Q. Filed in Ontario County? A. Yes.

Q. In connection with the New York State Estate Tax? A. Yes.

Q. Are you willing to offer all these together, that we offer all these together?

146

Mr. Hitchcock: I object to all of this. I won't say a word now.

The Court: Are they certified copies?

Mr. Moot: We are just offering the originals at this time. If we may, we will have certified copies sent on.

The Court: Certified copies are admissible anyway.

Mr. Moot: Is that agreeable, to have him take the originals back and send certified copies on?

Mr. Hitchcock: Yes.

Mr. Moot: The appraiser's report also?

The Witness: Yes.

147

Mr. Moot: And taxing order?

The Witness: Yes.

Mr. Moot: And receipt for the tax?

The Witness: Yes.

Mr. Moot: I offer this in evidence as one exhibit, with the understanding the Court reserves decision as to whether or not they are admissible.

The Court: Yes.

(Appraiser's report, taxing order, receipt for the tax, marked Plaintiff's Exhibit 1 in evidence.)

148 *Burrell T. Cappon—For Plaintiff—Direct.*

Mr. Moot: And certified copies will be supplied by the Surrogate's Court.

The Court: Very well.

Mr. Moot: Was any appeal taken from the taxing order?

Mr. Hitchcock: I object to that on the ground that it is incompetent, irrelevant and immaterial and res inter alios acta.

Mr. Moot: He can supply us with formal certificate of such appeal, but I want to get in the record that there
149 was no appeal.

Mr. Hitchcock: May I have a ruling?

The Court: I assumed that there was no appeal. Wouldn't the burden rest on somebody else?

Mr. Moot: You have no objection to my getting a certificate of no appeal? You have the same objection to that?

Mr. Hitchcock: I object on the grounds I have stated, and I would like a ruling on my objection.

The Court: I don't think that is material. Here is a court of record of the Surrogate's Court—

Mr. Moot: We want to show there is no appeal pending.

150 The Court: I will reserve my decision on each of these questions.

Mr. Moot: You can send certified copies of these papers and certificate of no appeal?

The Witness: Yes.

(Certificate of no appeal marked Plaintiff's Exhibit 2 in evidence.)

Mr. Moot: You may ask.

Mr. Hitchcock: I have no questions.

The Court: We will recess until 2 o'clock.

(Recess until 2 o'clock P. M.)

Offering of Exhibits in Evidence.

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After Recess, 2 P. M.

Mr. Moot: We have a certified copy of Letters of Administration.

Mr. Hitchcock: No objection.

(Certified copy of Letters of Administration marked Plaintiff's Exhibit 3 in evidence.)

Mr. Moot: And the short form certificate of letters of administration.

The Court: Of appointment?

152

Mr. Moot: Yes.

Mr. Hitchcock: No objection.

(Short form certificate of letters of administration marked Plaintiff's Exhibit 4 in evidence.)

Mr. Moot: I have a certified copy of the inquisition in the matter of the appointment of a Committee of the Person and Property of Helen Hall Vail.

Mr. Hitchcock: I object to that, solely on this ground: The complaint alleges Helen Hall Vail was adjudicated an incompetent in New York County, whatever date it was, in a court of competent jurisdiction. I don't know if that is of any materiality here or whether it isn't, but for the purpose of the record I object to it on the ground it has no material jurisdiction, because the other evidence in the case shows she was a resident of Ontario County, New York, and actually domiciled and living in the State of New Jersey, and what jurisdiction the Sheriff's jury of New York County Supreme Court had over her person and property so as to permit an adjudication as to her competency isn't clear to me at all.

153

The Court: It isn't admitted in the answer?

154 *Offering of Exhibits in Evidence.*

Mr. Hitchcock: We deny any knowledge or information sufficient to form a belief as to the answer in the complaint which recites those facts.

The Court: Don't the documents themselves show presumptive evidence of jurisdiction?

Mr. Hitchcock: I assume they would. I don't know.

The Court: I will overrule the objection.

Mr. Hitchcock: Exception.

Mr. Moot: This lady had a home in New Jersey and one in New York, and lived at the Plaza.

155 (Inquisition marked Plaintiff's Exhibit 5 in evidence.)

Mr. Moot: Now, I would like to call your Honor's attention to the inquisition (showing paper to Court).

I offer certified copy of Order of August 12, 1926, appointing Committees.

Mr. Hitchcock: Same objection.

Mr. Moot: I offer that in evidence.

The Court: Objection overruled.

Mr. Hitchcock: Exception.

(Certified copy of Order of August 12, 1926, appointing Committees marked Plaintiff's Exhibit 6 in evidence.)

156 Mr. Moot: I offer in evidence certified copy of Commission to Committees, dated August 25, 1926.

Mr. Hitchcock: No objection.

(Certified copy of Commission to Committees, dated August 25, 1926, marked Plaintiff's Exhibit 7 in evidence.)

Mr. Moot: I now offer in evidence the original commitment. The original commitment and order.

Mr. Hitchcock: For the record, I make the same objection and take the same exception.

157

Mr. Moot: This order is in Orange County, which is the place where the institution was located in which she was confined, made by the Supreme Court.

Mr. Hitchcock: Orange County, New Jersey, or Orange County, New York?

Mr. Moot: New York.

(Commitment petition and order received and marked Plaintiff's Exhibit 8 in evidence.)

Mr. Moot: I now offer in evidence the various papers filed with the 1926 allowance proceeding. First, the petition of M. H. Plumb. I think those papers are attached 158
to it (indicating).

The Court: They are attached to the pleadings?

Mr. Moot: Attached to the deposition.

Mr. Hitchcock: They are marked for identification; they were marked for identification on the deposition of Judge Lydon?

Mr. Moot: Yes, and attached to his deposition.

The Court: You are going to read them?

Mr. Moot: I will just read the ones I am offering in evidence.

Mr. Hitchcock: The less confusing procedure would be if you read the deposition, and if the exhibit is referred 159
to in the proper place in the deposition, that be put in at that time.

Mr. Moot: We will offer that deposition later.

The Court: It will be part of the deposition, attached to the deposition, and part of the 1926 allowance proceedings?

Mr. Moot: Yes, and I thought I would offer them with the allowance proceedings, to make that complete. We will offer the deposition.

Mr. Hitchcock: Wouldn't it be less confusing to take Judge Lydon's deposition, and, after you read it, those

160 papers are referred to there, they can be offered in evidence, and we are talking about the same thing here as before Judge Lydon.

Mr. Moot: The difficulty is you are taking Judge Lydon's deposition before you have the papers in the hearing before him.

The Court: Have you a certified copy of the record of the proceedings before him?

Mr. Moot: We haven't a certified copy of these papers because they are attached to that and we thought we would use them here.

161 The Court: What do you seek now to introduce?

Mr. Moot: The 1926 allowance proceedings.

The Court: Taken before Judge Lydon?

Mr. Moot: No, I am offering now the 1926 allowance proceedings before Judge Lydon.

The Court: That is what I mean.

Mr. Moot: After the institution of this action we went down and examined Judge Lydon as to his intent.

The Court: What you are offering now is the proceeding taken on the application for allowance?

Mr. Moot: Yes, that is right. First I offer the petition of Mrs. Plumb.

162 Mr. Hitchcock: I object to it, to the order in which it is offered, and solely to that.

The Court: That is all right. There may be some duplication, but that is all right. It is a separate proceeding. That is attached to the exhibit. What is the number there?

Mr. Moot: If the stenographer will make a note of it we will let him mark them later.

(Petition of M. H. Plumb marked Plaintiff's Exhibit 9 in evidence.)

Offering of Exhibits in Evidence.

163

Mr. Hitchcock: That is the same as Plaintiff's Exhibit 2 for identification referred to in the deposition. That is agreed?

Mr. Moot: I am checking it. Yes, all right; that is right.

Mr. Hitchcock: All right.

Mr. Moot: I offer the answer and cross petition of Farmers Loan & Trust Co., in the 1926 proceedings. It is Plaintiff's Exhibit 3 in the deposition.

(Answer and cross petition of Farmers Loan & Trust Co. in the 1926 proceedings marked Plaintiff's Exhibit 10 in evidence.) 164

Mr. Moot: The notice of appearance of Ieuan Harris as general guardian in the 1926 proceedings.

Mr. Hitchcock: That is Plaintiff's Exhibit 4 for identification in the deposition.

Mr. Moot: Yes.

Mr. Hitchcock: All right.

(Notice of appearance of Ieuan Harris as general guardian in the 1926 proceedings marked Plaintiff's Exhibit 11 in evidence.) 165

Mr. Moot: I offer the Order appointing Referee in the 1926 allowance proceeding.

Mr. Hitchcock: That is Plaintiff's Exhibit 5 for identification in the deposition?

Mr. Moot: Yes.

Mr. Hitchcock: All right.

(Order appointing Referee in the 1926 proceeding marked Plaintiff's Exhibit 12 in evidence.)

166 *Offering of Exhibits in Evidence.*

Mr. Moot: I next offer notice of hearing before Referee in the 1926 allowance proceedings.

Mr. Hitchcock: Plaintiff's Exhibit 6 for identification in the deposition.

(Notice of hearing before Referee in the 1926 allowance proceedings marked Plaintiff's Exhibit 13 in evidence.)

Mr. Moot: I offer the testimony before the Referee in the 1926 allowance proceeding.

167 Mr. Hitchcock: Plaintiff's Exhibit 7 for identification in the deposition.

(Testimony before Referee in the 1926 allowance proceeding marked Plaintiff's Exhibit 14 in evidence.)

Mr. Moot: I offer the report of the Referee.

Mr. Hitchcock: That is Plaintiff's Exhibit 8 for identification in the deposition?

Mr. Moot: Yes.

(Report of Referee marked Plaintiff's Exhibit 15 in evidence.)

Mr. Moot: Now, the Order of January 14, 1927, granting allowance.

168 Mr. Hitchcock: Plaintiff's Exhibit 1 for identification in the deposition.

(Order of January 14, 1927, granting allowances marked Plaintiff's Exhibit 16 in evidence.)

Mr. Hitchcock: That is also attached to the complaint, Counsel.

Mr. Moot: Those are all the exhibits offered in connection with the deposition.

Mr. Hitchcock: That is all of them, yes.

Offering of Exhibits in Evidence.

169 Mr. Moot: I have a memoranda here of exhibits in connection with the 1926 allowance proceedings not offered here; I would be glad to give a copy of it to the stenographer, if you would like to have it.

M. Hitchcock: What is the purpose?

Mr. Moot: We don't consider them important.

Mr. Hitchcock: We don't either, so far as that goes.

Mr. Moot: We will omit that.

Mr. Hitchcock: We will take a glance at it, to be sure.

Mr. Moot: If I may put it in the record?

170 Mr. Hitchcock: Don't clutter up this record with something that everybody agrees is not important.

The Court: It hasn't been offered.

Mr. Moot: Very well. I will withdraw that, then, your Honor. I don't care about it. They are not important now. On this 1926 allowance proceedings I thought at this time I would not take the time to read from the testimony before the Referee, for the reason you doubtless will look it over, and we covered it rather fully this morning. To save time, there is only one thing I will comment on, and that is in the report of the Referee. (Mr. Moot quotes from page 7 of Referee's report.)

171 Mr. Moot: I wish to offer a similar group of papers in connection with the 1932 allowance proceedings.

The Court: These items which you wish to introduce, I think it would be sufficient that they are all marked and received in evidence, and the objection noted to each at this time.

Mr. Hitchcock: I haven't objected to any of these yet, but I see no point in reading portions or smatterings from any of these exhibits that will have to be briefed and discussed.

The Court: You got the list here?

Mr. Moot: Yes, same as I have given to your Honor.

172 *Offering of Exhibits in Evidence.*

The Court: That can be marked later.

Mr. Hitchcock: State what you are offering. I don't have any objection to any of them.

The Court: Read them, yes.

Mr. Hitchcock: I don't know about these 1932 proceedings. I am familiar with the others.

The Court: You are offering petition of Mrs. Plumb, with notice of motion?

Mr. Moot: Yes. I offer that.

173 (Petition of M. H. Plumb, with notice of motion, marked Plaintiff's Exhibit 17 in evidence.)

Mr. Moot: I offer in evidence notice of appearance of City Bank Farmers Trust Co. in evidence.

(Notice of appearance of City Bank Farmers Trust Co. marked Plaintiff's Exhibit 18 in evidence.)

Mr. Moot: I offer answer of Committee of the Property.

(Answer of Committee of the Property marked Plain-
174 tiff's Exhibit 19 in evidence.)

Mr. Moot: I offer notice of appearance of Ieuan Harris as general guardian.

(Notice of appearance of Ieuan Harris as general guardian marked Plaintiff's Exhibit 20 in evidence.)

Mr. Moot: I offer answer of Ieuan Harris as general guardian.

(Answer of Ieuan Harris as general guardian marked Plaintiff's Exhibit 21 in evidence.)

Offering of Exhibits in Evidence.

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Mr. Moot: I offer affidavit of Dr. Neumann of May 3, 1932.

(Affidavit of Dr. Neumann of May 3, 1932, marked Plaintiff's Exhibit 22 in evidence.)

Mr. Moot: I offer order of May 4, 1932, appointing special gurdian and referee.

(Order of May 4, 1932, appointing special guardian and referee, marked Plaintiff's Exhibit 23 in evidence.)

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Mr. Moot: I offer answer of Special Guardian for Incompetent.

(Answer of Special Guardian for Incompetent marked Plaintiff's Exhibit 24 in evidence.)

Mr. Moot: I offer notice of hearing before the Referee.

(Notice of hearing before the Referee marked Plaintiff's Exhibit 25 in evidence.)

Mr. Moot: I offer testimony before the Referee.

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(Testimony before the Referee marked Plaintiff's Exhibit 26 in evidence.)

Mr. Moot: I offer notice of presentation of Referee's report.

(Notice of presentation of Referee's report marked Plaintiff's Exhibit 27 in evidence.)

Mr. Moot: I offer report of Referee.

178 *Offering of Exhibits in Evidence.*

(Report of referee marked Plaintiff's Exhibit 28 in evidence.)

Mr. Moot: I offer Order of May 31, 1932, amending title and prayer of petition. That is the one to which Mr. Hitchcock referred this morning, changing from $150,000 to $25,000 per annum.

(Order of May 31, 1932, amending title and prayer of petition, marked Plaintiff's Exhibit 29 in evidence.)

179 Mr. Moot: I offer Order of June 3, 1932, granting allowances.

(Order of June 3, 1932, granting allowances, marked Plaintiff's Exhibit 30 in evidence.)

Mr. Hitchcock: We will stipulate that Judge Ingraham is dead. The time isn't important.

Mr. Moot: He died on April 30, 1934.

Mr. Hitchcock: It is so stipulated.

Mr. Moot: I am not going to read from the testimony in that proceeding either, but I do wish to call your
180 attention to one or two things in the Referee's report, in this second proceeding. On page 5 Mr. Morgan reports no Will of the Incompetent having been discovered—(Mr. Moot reads pages 5, 7, 11 of Referee's report in second proceeding).

Mr. Hitchcock: You better get it marked now.

Mr. Moot: I offer report of Special Guardian.

(Report of Special Guardian marked Plaintiff's Exhibit 31 in evidence.)

Mr. Moot: I now offer in evidence proof in the intermediate account; first the account.

181

Mr. Hitchcock: That is all objected to, because as I assume—and if I am wrong you correct me—you are referring to the intermediate accounting by the Committee during the incompetency of Mrs. Vail?

Mr. Moot: Yes, I am offering the intermediate judicial settlement of the account, or proceedings of the City Bank Farmers Trust Co. as Committee of the Incompetent Helen Hall Vail.

Mr. Hitchcock: I object to it. There is no relevancy to any issue involved here.

Mr. Moot: This intermediate accounting is—

182

The Court: That is a judgment of February 20, 1934, settlement, settling the account.

Mr. Moot: Proof under the intermediate accounting. It goes down to April 1, 1933.

The Court: I assume you mean the extent of her Estate is going to be considered in determining the question of intent?

Mr. Moot: And the amount of disbursement and increase in surplus.

The Court: Overruled.

Mr. Hitchcock: Exception.

(Account above described marked Plaintiff's Exhibit 32 in evidence.) 183

Mr. Hitchcock: That is just the account itself?

Mr. Moot: Yes.

The Court: Do you have below this a final accounting?

Mr. Moot: I have next a supplemental account to bring it to July 1, 1933.

Mr. Hitchcock: Same objection.

The Court: Same ruling.

Mr. Hitchcock: Same exception.

(Supplemental account above described marked Plaintiff's Exhibit 33 in evidence.)

184 *Offering of Exhibits in Evidence.*

Mr. Moot: Next I offer report of the Special Guardian for the Incompetent.

Mr. Hitchcock: Same objection.

The Court: Same ruling.

Mr. Hitchcock: Same exception.

(Report of Special Guardian for the Incompetent marked Plaintiff's Exhibit 34 in evidence.)

Mr. Hitchcock: In what proceeding?

185 Mr. Moot: Intermediate judicial settlement of the account.

Mr. Hitchcock: I object to it on the ground it is immaterial for any purpose and irrelevant.

The Court: I don't see that the report of the Special Guardian is immaterial. It may be considered with the account itself.

Mr. Moot: Judgment of February 20, 1934, settling the account.

Mr. Hitchcock: Same objection.

Mr. Moot: It shows he checked everything, this report of Special Guardian.

Mr. Hitchcock: I object to the judgment.

186 The Court: Same ruling.

Mr. Hitchcock: Same exception.

(Judgment of February 20, 1934, settling account, marked Plaintiff's Exhibit 35 in evidence.)

Mr. Moot: Now I have the proof of final accounting.

Mr. Hitchcock: Same objection.

The Court: What is the date of her death?

Mr. Moot: December 1935, December 27th.

The Court: All right, all right.

Mr. Hitchcock: I object.

187

The Court: Overruled.
Mr. Moot: I offer this final account.

(Final account marked Plaintiff's Exhibit 36 in evidence.)

Mr. Moot: Next I offer final order of December 9, 1936, settling the final account.
Mr. Hitchcock: Same objection.
The Court: Same ruling.
Mr. Hitchcock: Exception.

188

(Final order of December 9, 1936, settling final account, marked Plaintiff's Exhibit 37 in evidence.)

Mr. Moot: I wish to offer in evidence original Federal Estate Tax return on Form 706.

(Original Federal Estate Tax return on Form 706 marked Plaintiff's Exhibit 38 in evidence.)

Mr. Moot: This is just formal proof, your Honor. I offer original claim for refund.
Mr. Hitchcock: No objection.

189

(Original claim for refund marked Plaintiff's Exhibit 39 in evidence.)

Mr. Moot: This is the original letter from the Commissioner of Internal Revenue to the City Bank Farmers Trust Co., dated November 3, 1937. I offer that.
Mr. Hitchcock: No objection.

(Original letter from Commissioner of Internal Revenue, dated November 3, 1937, marked Plaintiff's Exhibit 40 in evidence.)

190 *Offering of Exhibits in Evidence.*

Mr. Moot: Next the letter dated April 5, 1938, the 90-day letter.

Mr. Hitchcock: No objection.

Mr. Moot: From the Commissioner of Internal Revenue to City Bank Farmers Trust Co., dated April 5, 1938.

(Letter dated April 5, 1938, from Commissioner of Internal Revenue, marked Plaintiff's Exhibit 41 in evidence.)

191 Mr. Moot: Next, notice and demand for payment of $436,031.67, and interest of $30,880.60, stamped paid June 22 1938.

Mr. Hitchcock: No objection.

(Notice and demand for payment of $436,031.67 and interest of $30,880.60, marked Plaintiff's Exhibit 42 in evidence.)

Mr. Moot: Letter from Treasury Department, dated July 28, 1938, rejecting claim for refund, from the Treasury Department to the City Bank Farmers Trust Co.

192 (Letter from Treasury Department, dated July 28, 1938, marked Plaintiff's Exhibit 43 in evidence.)

* * * * * * * * *

Mr. Moot: Plaintiff rests, your Honor.

The Court: Plaintiff rests?

Mr. Moot: Yes.

Mr. Hitchcock: I renew my motion made at the opening of the case to dismiss the complaint because of failure to state facts sufficient to constitute a cause of action.

193

The Court: I will reserve my decision on that motion.

Mr. Hitchcock: The defendant moves to dismiss the complaint because of the failure of the plaintiff to prove the cause of action as alleged in the complaint, or any cause of action.

The Court: Same action taken.

Mr. Hitchcock: The Government moves for a directed verdict in favor of the Government on the same ground, that there is no evidence here alleging the plaintiff to have sustained its position in support of the cause of action alleged in the complaint, or any cause of action.

194

The Court: Same ruling.

Mr. Hitchcock: I will note an exception. I will note an exception to your Honor's failure to grant my motions.

The Court: Motions denied.

Mr. Hitchcock: Exception.

(Discussion had off the record.)

Mr. Hitchcock: I offer in evidence individual income tax return for the year 1927 showing net income of $194,000 plus, for Mr. Harris, Geneva, New York. I offer that in evidence.

Mr. Moot: I object to that. I object to it on the ground it is incompetent, irrelevant, and not an issue in this case in any way. Mr. Harris testified that he wasn't in need of any financial assistance, and never had been, and there never was any claim of need on the part of the Harrises. It is entirely immaterial what his income was, whether it was ten dollars or a hundred thousand dollars or two hundred thousand dollars.

195

Mr. Hitchcock: Judge Lydon didn't think so. He said if he had known it, he wouldn't have made the gift.

Mr. Moot: That goes only to the question of amount, and the Judge answered that question. To bring in outside facts, what Mr. Harris' income was, is to get in some other issues. I don't believe they are competent.

The Court: I will receive it.

196 *Offering of Exhibits in Evidence.*

(Income tax return for the year 1927 of Mr. Harris, Geneva, New York, received in evidence and marked Defendant's Exhibit "A".)

Mr. Hitchcock: I make the same offer with respect to the tax return for the calendar year 1928 of the same taxpayer, showing a net income of one hundred and eighty-two thousand plus dollars.

Mr. Moot: I object on the same ground, and add to that objection of mine that the record can not be properly added to now, this record, testimony of Judge Lydon.

197

The Court: Overruled.

Mr. Moot: Exception.

(Income tax return for the year 1928 of Mr. Harris, received in evidence and marked Defendant's Exhibit "B".)

Mr. Hitchcock: I offer in evidence tax return for the calendar year 1929 of the same taxpayer, Mr. Harris, in the amount of one hundred and eighty-four thousand plus dollars.

198 Mr. Moot: Same objection.

The Court: Same ruling.

Mr. Moot: Exception.

(Tax return for year 1929 of Mr. Harris, received in evidence and marked Defendant's Exhibit "C".)

Mr. Hitchcock: The same thing for the calendar year 1930, showing net income of one hundred and ninety-six thousand plus dollars.

Mr. Moot: Same objection.

The Court: This is Harris?

199

Mr. Hitchcock: Yes, the father of these children.
The Court: Overruled.
Mr. Moot: Exception.

(Tax return for year 1930 of Mr. Harris, received in evidence and marked Defendant's Exhibit "D".)

Mr. Hitchcock: Those are the originals. May I have photostats substituted for them, which are not available at the moment? They will be sent from Washington. We are not permitted to leave these here, and if Counsel desires copies, I will send them photostats.

200

Mr. Moot: Haven't you present in the record everything you want in connection with those returns? I object to the admission of anything else. I object to anything else there, except the amounts. I have objected to the whole thing, but I object very particularly to any reason for putting in anything else.

Mr. Hitchcock: Maybe we can agree with that. Just a minute. Suppose I read from those what the gross as well as the net is, and then I am content to leave that in the record.

Mr. Moot: I object to that. These are of a confidential nature; under the Statute they are confidential, and I do not believe Counsel has any right to take these returns from the files of the defendant and use them in this case.

201

Mr. Hitchcock: If you take that position, I will ask for an adjournment and have a subpoena served on one Mr. Harris to be brought in Court and testify what the gross and net returns were for those years in question, if you want it that way.

Mr. Moot: I do not see that the gross return has anything to do with it. You have given the net figures in the case.

202

The Court: Can't we stipulate this? You are both familiar with the amounts. Can't we stipulate the gross and net incomes?

Mr. Hitchcock: I will read from the exhibit received in evidence.

Mr. Moot: You have read the net income for those years.

Mr. Hitchcock: You can examine them. Here is the gross shown.

Mr. Moot: I object to that. I do not see that the gross has any bearing on it. That is entirely confidential

203 information.

The Court: I will receive this. You stipulate the amount of the net income.

Mr. Hitchcock: We want the gross.

The Court: Then you get into the question of expenses and money expended on these things, and I don't believe you should go into it.

Mr. Hitchcock: The gross shows what he had available to use.

The Court: If you are going into the gross as well as the net, you are going into deductions and losses and everything else. For the purpose of this suit, this income

204 is sufficient.

Mr. Hitchcock: I will take an exception to your Honor's ruling preventing us from putting in the gross income; the net income is on the record, so that there will be no necessity of marking or submitting photostats of these exhibits. Defendant rests.

I renew my motion and ask for a directed verdict on the grounds made at the conclusion of the Plaintiff's case.

The Court: Same ruling.

Mr. Hitchcock: Same exception.

The Court: I will reserve decision.

PROCEEDINGS CLOSED.

Plaintiff's Exhibit 1.

205

Total Amounts of Schedules A, B and C of the New York Estate Tax Return.

Schedule A	$ 34,000.00
Schedule B	1,612,686.00
Schedule C	507,652.65

Schedule E of New York Estate Tax Return.

TRANSFERS

206

Transfers made in contemplation of death

NONE

Transfers not admitted to have been made in contemplation of death:

Pursuant to application of MaBelle Houghton Plumb, decedent's daughter, the Supreme Court, New York County, made an order dated January 14, 1927, authorizing and directing City Bank Farmers Trust Company (then known as Farmers' Loan and Trust Company), as the duly appointed and acting Committee of the property of the decedent who was at that time an incompetent person, to pay out of the unexpended income of the decedent (then incompetent), the following sums annually:

207

To MaBelle Houghton Plumb, daughter	$50,000
To Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren	50,000
To Edward Hageman Hall, brother	2,000
To Mary Hall Taft, sister	3,000
To Elizabeth Hall Burdick, sister	2,000
To Abee Ferrin, sister	2,000
To Lucy Hall Ferrin, sister	2,000

208 *Plaintiff's Exhibit 1.*

Pursuant to a further application made by said MaBelle Houghton Plumb, the Supreme Court, New York County, made an order dated June 3, 1932, granting additional allowances out of the unexpended income of the decedent (then incompetent) to be paid by said City Bank Farmers Trust Company, as Committee. Said increases were made retroactive for a period of five years, and increased the allowances to said MaBelle Houghton Plumb and the Guardian for the infant grandchildren to the extent of $25,000 per annum each. The total amount of all allow-
209 ances out of the incompetent's income paid under the said orders of January 14, 1927 and June 3, 1932, is $1,377,866.67. True copies of said orders are attached to this return.

The foregoing allowances made by the Court have been characterized by the Appellate Division as "gifts" and are, therefore, not taxable as transfers or advancements. (See *Matter of Farmers' Loan & Trust Company*, 181 App. Div. 642.)

Recapitulation from Report of New York Estate Tax Appraiser, dated June 27, 1936.

210

Personal Property	$2,281,463.23
Real Estate	$ 34,000.00
Total	$2,315,463.23
Debts, expenses and commissions	$ 480,222.09
Net estate	$1,835,241.14

Plaintiff's Exhibit 1.

211

Order of Surrogate's Court, Ontario County, New York, Fixing Tax.

AT A SURROGATE'S COURT held in and for the County of Ontario, at the Surrogate's office, in the city of Canandaigua, N. Y., on the 26th day of June, 1936.

Present, HON. FRED D. CRIBB, Surrogate.

212

IN THE MATTER

of the

APPRAISAL OF THE ESTATE OF
HELEN HALL VAIL

Deceased.

On reading the report filed the 26th day of June, 1936 of Lee H. Leland, Esq., the appraiser appointed by order of this Court, dated the 26th day of June, 1936, and it appearing that the said decedent died on the 27th day of December, 1935, it is

213

ORDERED AND ADJUDGED that the market value of the gross estate of said decedent at the time of death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

214 *Plaintiff's Exhibit 1.*

Gross estate	$2,315,463.23
Total deductions allowed by statute	480,222.09
Net estate	$1,835,241.14

Tax on net estate not in excess of $150,000, less $20,000.00 exemptions allowed under Section 249-q	$ 1,300.00
$ 50,000.00	1,000.00
100,000.00	3,000.00
200,000.00	8,000.00
215 200,000.00	10,000.00
200,000.00	12,000.00
200,000.00	14,000.00
500,000.00	40,000.00
235,241.14	21,171.71
Total Tax	$110,471.71

FRED D. CRIBB
Surrogate.

216

217

Plaintiff's Exhibit 2.

ONTARIO COUNTY SURROGATE'S OFFICE
Canandaigua, New York

STATE OF NEW YORK

SURROGATE'S COURT : ONTARIO COUNTY.

In the Matter of the Estate Tax upon the Estate of HELEN HALL VAIL, late of the City of Geneva, County of Ontario, State of New York, deceased. 218

I, Burrell T. Cappon, Clerk of the Surrogate's Court of the County of Ontario, State of New York, do hereby certify that an estate tax was assessed by the State of New York against the estate of HELEN HALL VAIL, late of the City of Geneva, County of Ontario, State of New York, deceased, in the amount of $110,471.71.

I do further certify that the amount of said tax, less a rebate of five per centum thereon in the amount of $5,523.58, was duly paid as appears from a receipt showing payment in the amount of $104,948.13 on file in my office; that said receipt was duly signed by the Treasurer of the County of Ontario, State of New York, under date of June 27, 1936, and countersigned by the State Tax Commission of the State of New York, by W. E. Stephens, Deputy Tax Commissioner under date of June 29, 1936; that there were no penalties or interest imposed or charged; that no claim for refund of such taxes or any part thereof is pending and that no refund of such taxes or any part thereof has been authorized; that 219

220 *Plaintiff's Exhibit 3.*

no objection has been filed to the order fixing such tax nor is an appeal pending in said estate tax proceeding.

In Witness Whereof, I have hereunto set my hand and the seal of the Surrogate's Court of the County of Ontario, State of New York, this 7th day of May, 1941.

(Seal)

Burrell T. Cappon
Clerk, Surrogate's Court

---

221 **Plaintiff's Exhibit 3.**

THE PEOPLE OF THE STATE OF NEW YORK

To City Bank Farmers Trust Company of the City of New York in the County of New York and State of New York send Greeting:

Whereas, Helen Hall Vail late of the City of Geneva in the County of Ontario, and State of New York, died on or about the 27th day of December, 1935, intestate:

And Whereas, On the 10th day of February, 1936, at a Surrogate's Court, held at Canandaigua, in and for
222 our County of Ontario, a decree was duly made, awarding Letters of Administration upon the estate of the said deceased to you: And you having taken your official consent, and duly filed with the Surrogate of our said County of Ontario the said consent required by law:

Now, Therefore, Know ye that we, having full faith and confidence in your competency, have granted, and by these presents do grant unto you, the said City Bank Farmers Trust Company the Administration of all and singular the goods, chattels, and credits which were of the said deceased, hereby constituting and appointing you Administrator thereof.

Plaintiff's Exhibit 3. 223

WITNESS, Hon. Fred D. Cribb
Surrogate of our said County of Ontario, and the seal of our said Surrogate's Court, this
(L. S.) 10th day of February, in the year one thousand nine hundred and thirty-six,

Fred D. Cribb Surrogate.

I CERTIFY the foregoing to be a true copy of the Letters of Administration issued by me on the Estate of Helen Hall Vail, deceased. 224

Recorded and compared this 10th day of February, 1936.

Fred D. Cribb Surrogate.

STATE OF NEW YORK }
ONTARIO COUNTY SURROGATE'S OFFICE } ss.:

I, Burrell T. Cappon, Clerk of the Surrogate's Court of the County of Ontario, in the State of New York, do hereby Certify that I have compared the foregoing copy of Letters of Administration issued on the estate of HELEN HALL VAIL, deceased, with the record of the 225
original of said Letters of Administration in said Surrogate's Office, and that said copy is a correct transcript of the whole of said original record now remaining in said office.

WITNESS my hand and the seal of said Surrogate's Court, at Canandaigua, N. Y., this 15th
L. S. day of April, 1941.

BURRELL T. CAPPON,
Clerk, Surrogate's Court.

(Seal)

226

Plaintiff's Exhibit 5.

NEW YORK SUPREME COURT

NEW YORK COUNTY

IN THE MATTER of the Appointment of a Committee of the Person and a Committee of the Property of

HELEN HALL VAIL,

227 an alleged incompetent person

INQUISITION

Clerk's No. 28867—1926

Montgomery Peabody & Grace
Attorneys for Petitioner
No. 15 William Street
228 New York, N. Y.

Filed
Aug 12 '26
Co. Clerk's Office

Plaintiff's Exhibit 5. 229

NEW YORK SUPREME COURT

NEW YORK COUNTY

IN THE MATTER of the Appointment of a Committee of the Person and a Committee of the Property of HELEN HALL VAIL an alleged incompetent person.	INQUISITION

230

By virtue of a commission in the nature of a Writ de Lunatico Inquirendo, issued out of and under the seal of the Supreme Court for the County of New York, dated the 3rd day of August, 1926, an inquisition as to the competency, among other things, of HELEN HALL VAIL, was taken in the office of the Sheriff of the County of New York, Hall of Records, Borough of Manhattan, City of New York, on the 11th day of August, 1926, before the three Commissioners herein, to wit: 231

Arthur Johns, Counselor-at-Law,
William H. Quinn,
Philip F. O'Hanlon, M. D.

twelve (12)

and before a jury of ~~fifteen (15)~~ indifferent persons qualified to serve, and not exempt from serving, as trial jurors in the Supreme Court for the County of New York, having been duly summoned, duly sworn and charged, and whose names are as follows: John H O'Brien, R W Bartram J G Batenson E E Wright

232 *Plaintiff's Exhibit 5.*

James O Stack Isaac Lewenthal Edward B Kelly Wm H Hamilton Emoy L Lyon E Lester Barnes Charles D. Draper & George W. Kavanaugh.

The said jurors, pursuant to the said inquisition, upon their oaths find and say:

1. That the said HELEN HALL VAIL, for at least twelve months last past has been and now is a lunatic, suffering from cerebral arterio-sclerosis, with dementia, hallucinations, and senile arterio-sclerotic chorea, together with
233 lack of insight and proper appreciation of her affairs and impairment of business judgment, and by reason thereof she is incapable of governing herself and managing her affairs and property, and incapable of properly taking care of her person, affairs and property. That the above condition still continues to exist at the present time.

2. That as far as has been brought to the knowledge of this commission and jury, the said Helen Hall Vail has not aliened any of her lands.

3. That the value of the real property of the said
234 Helen Hall Vail is as follows:

(a.) 30 acres or thereabouts, with improvements thereon, situated in the City of Geneva, County of Ontario, State of New York, of the assessed value of $41,200., and of the market value of approximately $100,000.

(b.) 15 acres or thereabouts, with improvements thereon, situated at Palm Beach, in the County of Palm Beach, State of Florida, of the assessed value of $59,460., and of the market value of approximately $75,000.

Plaintiff's Exhibit 5.

235

(c.) House and lot at Spring Lake, in the County of Monmouth, State of New Jersey, of the assessed value of $13,400., and of the market value of approximately $25,000.

4. That on the 10th day of August, 1926, there was on deposit with The Farmers' Loan and Trust Company of the City of New York to the account of the said Helen Hall Vail the sum of $17,972.55.

That the said The Farmers' Loan and Trust Company holds as Agent in the County of New York for the said Helen Hall Vail the following securities of a total value of $484,100.00. 236

Bond and Mortgages	Par Value	Rate		Interest Payable		
Hugh M. Inman John H Fredk C & Chas 42 W 57th St. N.Y.C. Part Int in 65000.00	40,000.00	5½		Jun	Dec	
Hoagland Corp 29/41 W 42nd St. & 34/48 W 43rd St. N.Y.C. Part Int in 2500000.00	9,100.00	5	15	Feb	Aug	237
Trustees of Columbia University	110,000.00	5	6	May	Nov	
Benjamin Winter N/E Cor 5th Ave & 43rd St	325,000.00	5	30	Apr	Oct	
	484,100.00					

238 *Plaintiff's Exhibit 5.*

That the said Helen Hall Vail is the life beneficiary of a Trust created under the Last Will and Testament of Charles F. Houghton, deceased, of which the said The Farmers' Loan and Trust Company is Trustee. That the said Trust constitutes the residuary estate of the said Charles F. Houghton, deceased.

That the income from the said Trust for the calendar year 1924 amounted to the sum of $298,499.59.

That the income from the said Trust for the calendar year 1925 amounted to the sum of $327,260.21.

239 That The Farmers' Loan and Trust Company as Trustee, on the 10th day of August, 1926, had income received to that date but unpaid in the sum of $255,141.70.

5. That said Helen Hall Vail also has jewelry, household furniture and personal effects in the several residential dwellings above mentioned, amounting in value in all to approximately $150,000.

6. That the total income of the said Helen Hall Vail derived from the foregoing trust and all other sources for the year 1925 (the income from the above mentioned invested surplus of income being estimated for the reason
240 that all said surplus income was not invested in the year 1925) amounted to the sum of $351,665.21.

7. That the said Helen Hall Vail is a widow, 74 years of age, and that her only next of kin and heirs at law are her daughter, MaBelle Houghton Plumb, who resides at No. 3 College Lane, in the City of Haverford, State of Pennsylvania, who is of full age and sound mind, and John H. Harris, William R. Harris and David F. Harris, the children of a deceased daughter of said Helen Hall Vail, who resides with their father, Ieuan Harris, in the City of Geneva, State of New York, and who are infants under the age of 14 years.

Plaintiff's Exhibit 5.

241

In Testimony Whereof the said Commissioners as well as the jurors aforesaid have to this inquisition set their hands and seals this 11th day of August, 1926.

Arthur Johns L. S.
Philip E. O'Hanlon, M. D. L. S.
William H. Quinn L. S.
Commissioners.

Jno. H. O'Brien L.S.
Ren W. Bartram L.S.
J. G. Batenson L.S.
E. E. Wright L.S.
James O. Stack L.S.
Isaac Lewenthal L.S.
Edward B. Kelly L.S.
Wm. H. Hamilton L.S.
Emoy L. Lyon L.S.
E. Lester Barnes L.S.
Charles D. Draper L.S.
George W. Kavanaugh L.S.
Jurors.

242

No. 16198

State of New York, }
County of New York, } ss.:

243

I, William T. Collins, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original certificate of inquisition on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original.

Indorsed Filed. Aug. 12, 1926.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 30 day of Aug. 1926.

William T. Collins,
Clerk.

244

Plaintiff's Exhibit 6.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER of the Appointment of a Committee of the Person and a Committee of the Property of

HELEN HALL VAIL

an alleged incompetent person.

245

FINAL ORDER APPOINTING COMMITTEES, ETC.

Clerk's No. 28867—26

MONTGOMERY, PEABODY & GRACE,
Attorneys for Petitioner,
Office & P. O. Address,
15 William Street,
Borough of Manhattan,
New York City.

246

ENTERED

Filed
Aug 13 '26
Co. Clerk's Office

Plaintiff's Exhibit 6.

247

At a Special Term of the Supreme Court of the State of New York, held in and for the First Judicial District at the County Court House in New York County, Borough of Manhattan, City of New York, on the 12th day of August, 1926.

Present: Hon. Charles L. Guy, Justice.

In the Matter of the Appointment of a Committee of the Person and a Committee of the Property of

Helen Hall Vail

an alleged incompetent person.

Final Order Appointing Committee, etc. 248

Upon reading and filing the petition of MaBelle Houghton Plumb, duly verified August 12th, 1926, praying, among other things, that the findings of the Sheriff's Jury upon the execution of the commission heretofore issued herein, as contained and set forth in the inquisition returned thereon, be in all respects confirmed, and that MaBelle Houghton Plumb, the petitioner herein, be appointed committee of the person of the above named Helen Hall Vail, an alleged incompetent person, upon giving such security as shall be required by law, and as to the Court should seem proper, and that The Farmers' Loan and Trust Company of the City of New York, be appointed committee of the property and estate of the above named Helen Hall Vail, an alleged incompetent person, and for other relief; and upon reading and filing the affidavit of regularity herein, made by John D. Peabody and verified August 12th, 1926, attached to said petition; the affidavit respecting the amount of security

249

250 *Plaintiff's Exhibit 6.*

to be given by the committee of the person, made by John D. Peabody and verified August 12th, 1926, attached to said petition; the affidavit of John D. Peabody respecting the petitioner's necessary disbursements and costs and counsel fees, verified August 12th, 1926, attached to said petition; and upon reading and filing the affidavit of George H. Cowie, Esq., Special Guardian of said HELEN HALL VAIL, verified August 12th, 1926, and the affidavit of Thomas Keogh, Esq., Special Guardian of John H. Harris, William R. Harris and David F. Harris,
251 the infant next of kin of said HELEN HALL VAIL, verified August 11th, 1926; and upon all the papers heretofore filed, and upon all the proceedings heretofore had herein, and the matter having duly come on to be heard before this Court on August 11th, 1926, John S. Montgomery, Esq., of counsel for MaBelle Houghton Plumb, the petitioner herein, having duly appeared and been heard in support of the said petition, and George H. Cowie, Esq., Special Guardian for HELEN HALL VAIL, the alleged incompetent person, and Thomas Keogh, Esq., Special Guardian for John H. Harris, William R. Harris and David F. Harris, the infant next of kin of the said HELEN HALL VAIL, having
252 duly appeared and been heard, and due deliberation having been had thereon, and no objection having been made by the said Special Guardians,

Now, on motion of Montgomery, Peabody & Grace, attorneys for MaBelle Houghton Plumb, the petitioner herein, it is

ORDERED, that the findings of the Sheriff's Jury upon the execution of the commission in the above entitled proceeding, as set forth in the inquisition herein, dated August 11th, 1926, and duly filed in the office of the Clerk of the County of New York August 12th, 1926, be and the

253

same hereby are in all respects ratified, approved and confirmed; and it is further

ORDERED, that MaBelle Houghton Plumb, of No. 3 College Lane, Haverford, Pennsylvania, be and she hereby is appointed Committee of the person above named, upon filing with the Clerk of this Court a bond with sufficient sureties to be approved by a Justice of this Court, in the sum of Two Thousand Dollars, and conditioned that she will in all things faithfully discharge the trust imposed upon her and obey all directions of the Court in regard to the trust, make and render a just and true 254
account of all moneys and other properties received by her and the application thereof and of her acts in the administration of her trust whenever so required to do by the Court; and it is further

ORDERED, that The Farmers' Loan and Trust Company of the City of New York be and it hereby is appointed the committee of the property and estate of the said HELEN HALL VAIL, the incompetent person above named, without bond, upon the condition, however, that it will in all things faithfully discharge the trust imposed upon it and obey all directions of the Court in regard to the 255
trust, make and render a just and true account of all moneys and properties received by it, and the application thereof and of its acts in the administration of its trust whenever so required to do by the Court; and it is further

ORDERED, that the said committee of the property and estate is hereby vested with the usual powers prescribed by law, and that a commission be issued in due form of law, under the seal of this Court, to it as such committee; and it is further

256 *Plaintiff's Exhibit 6.*

ORDERED, that upon the due giving, filing and recording of such security as hereinbefore directed the said committee of the person shall be vested with the usual powers prescribed by law, and that thereupon a commission be issued in due form of law, under the seal of this Court, to her as such committee; and it is further

ORDERED, that the said The Farmers' Loan and Trust Company, as said committee of the property and estate of HELEN HALL VAIL, the incompetent person herein, be
257 and it hereby is empowered, authorized and directed to expend the sum of Six Hundred ($600.) Dollars, with which to pay DR. HENRY ALSOP RILEY his fees for examination of said HELEN HALL VAIL, the incompetent person, and his testimony before the commission; and the sum of Four Hundred and Fifty ($450.) Dollars with which to pay DR. LEON H. CORNWALL his fees for examination of said HELEN HALL VAIL, the incompetent person, and his testimony before the commission; and the sum of One Thousand Dollars with which to pay DR. HENRY A. COTTON his fees for examination of said HELEN HALL VAIL, the incompetent person, and his testimony before the commission; and the sum of Five Hundred Dollars
258 with which to pay DR. JAMES S. ALLEN his fees for testimony before the commission; and the sum of Seven Hundred and Fifty Dollars with which to pay DR. WILLIAM STEINACH his fees for examination of said HELEN HALL VAIL, the incompetent person, and his testimony before the commission; and it is further

ORDERED, that the said committee of the property and estate of the said HELEN HALL VAIL, the incompetent person herein named, be and it hereby is empowered and authorized to expend the sum of Two Hundred ($200.) Dollars with which to pay ARTUR JOHNS, ESQ., for his

services as commissioner, appointed by this Court on the said commission; the sum of Two Hundred ($200.) Dollars with which to pay WILLIAM H. QUINN, ESQ., for his services as commissioner, appointed by this Court on the said commission; the sum of Two Hundred ($200.) Dollars with which to pay PHILIP F. O'HANLON, M.D., for his services as commissioner, appointed by this Court on the said commission; the sum of Twenty-five hundred ($2500.) Dollars with which to pay GEORGE H. COWIE, ESQ., Special Guardian heretofore appointed by this Court for said HELEN HALL VAIL, which sum is hereby awarded him as such special guardian as an allowance herein; the sum of Fifteen Hundred ($1500.) Dollars with which to pay THOMAS KEOGH, ESQ., Special Guardian heretofore appointed by this Court for said John H. Parris, William R. Harris and David F. Harris, the infant next of kin of said HELEN HALL VAIL, the incompetent person, which sum is hereby awarded him as such special guardian as an allowance herein; the sum of Fifteen Thousand ($15,000.) Dollars with which to pay MONTGOMERY, PEABODY & GRACE, attorneys for MaBelle Houghton Plumb, the petitioner herein, which sum is hereby awarded said firm as such attorneys for the petitioner herein, as and for their costs and counsel fees herein; and the sum of Three Hundred and Sixty-four & 72/100 ($364.72) Dollars with which to pay MONTGOMERY, PEABODY & GRACE, attorneys for said Mabelle Houghton Plumb, the petitioner herein, which sum is hereby awarded said firm as such attorneys for the petitioner herein, as and for the necessary disbursements of the petitioner herein; and it is further

259

260

261

ORDERED, that all persons are hereby directed and commanded to deliver to The Farmers' Loan and Trust Company as such committee of the property and estate of said

262 *Plaintiff's Exhibit 6.*

HELEN HALL VAIL, the incompetent person herein named, upon demand and presentation of a certified copy of the said commission to committee, all property of the said incompetent person of every kind and nature which may be in their possession or under their control; and it is further

ORDERED, that the said The Farmers' Loan & Trust Company is hereby further required out of the property and estate and out of any moneys which shall come into its hands, after the payment of all the sums of money
263 herein directed to be paid, to provide for the support, maintenance, treatment and sustenance of the said HELEN HALL VAIL, so far as it receives income, funds or other property belonging to said incompetent person; and it is further

ORDERED, that the said MaBelle Houghton Plumb, committee of the person of HELEN HALL VAIL, the incompetent person, and the said The Farmers' Loan and Trust Company, committee of the property and estate of said HELEN HALL VAIL, the incompetent person, be and they hereby are required so to provide for the said HELEN HALL VAIL, and to see that she is properly cared for in a manner
264 suitable to her means and social position; and it is further

ORDERED, that the said committee of the person of said HELEN HALL VAIL, the incompetent person herein named, and the said committee of the property and estate of the said HELEN HALL VAIL, the incompetent person herein named, or any party to this proceeding may apply at the foot of this final order for any necessary instructions and directions of this Court, upon giving due notice.

Enter

CHARLES L. GUY,
J. S. C.

Plaintiff's Exhibit 6.

265

No. 16201

State of New York, }
County of New York, } ss.:

I, WILLIAM T. COLLINS, Clerk of the said County and Clerk of the Supreme Court of said State for said County, DO CERTIFY, That I have compared the preceding with the original certificate of Final Order appointing Committees, etc., on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original.

266

Indorsed Filed. Aug. 13-1926.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 30 day of Aug., 1926.

WILLIAM T. COLLINS,
Clerk.

(Seal)

267

268 **Plaintiff's Exhibit 7.**

Index No. 28867
Year 1926

NEW YORK SUPREME COURT

NEW YORK COUNTY.

IN THE MATTER of the Appointment of a Committee of the Person and a Committee of the Property of

269 HELEN HALL VAIL,

an incompetent person.

COMMISSION TO COMMITTEES.

Montgomery, Peabody & Grace,
Attorneys for MaBelle Houghton
Plumb, Petitioner,
Office & P. O. Address,
15 William Street,
270 Borough of Manhattan,
New York City.

COMMISSION TO COMMITTEES.

THE PEOPLE OF THE STATE OF NEW YORK,
TO ALL TO WHOM THESE PRESENTS SHALL COME,

GREETING:

WHEREAS, by a certain inquisition taken at the Jury Room in the office of the Sheriff of the County of New York, in the Hall of Records, in the Borough of Manhattan,

Plaintiff's Exhibit 7.

City of New York, on the 11th day of August, 1926, by virtue of our commission in the nature of a writ de lunatico inquirendo on that behalf duly made and issued, it was found, among other things, that HELEN HALL VAIL, an alleged incompetent person, at the time of the taking of the said inquisition was an incompetent, and that she was unable to manage herself or her affairs, as by the said inquisition made and dated August 11th, 1926, and filed in the office of the Clerk of the County of New York on August 12th, 1926, will more fully appear, and for the care and custody of whom and for the management of whose property and estate it belongs to us in our Supreme Court to provide; and

WHEREAS, by an order duly made and entered on the 12th day of August, 1926, and entered in the office of the Clerk of the County of New York on the 13th day of August, 1926, in a proceeding in the Supreme Court of the County of New York, entitled "In the Matter of the Appointment of a Committee of the Person and a Committee of the Property of HELEN HALL VAIL, an alleged incompetent person", MaBelle Houghton Plumb, of the City of Haverford, State of Pennsylvania, was appointed committee of the person of the said HELEN HALL VAIL, upon giving and recording in the said Clerk's office a bond for the security required by law, in the sum of Two Thousand ($2,000.00) Dollars, to be approved by a Justice of said Court, and conditioned that said MaBelle Houghton Plumb, as such committee, would in all things faithfully discharge the trust imposed upon her and obey all directions of the Court in regard to the trust, make and render a just and true account of all moneys and other properties received by her and the application thereof, and of her acts in the administration of her trust whenever so required to do by the Court; and

WHEREAS, by said order bearing date the 12th day of August, 1926, The Farmers' Loan and Trust Company of

274 *Plaintiff's Exhibit 7.*

the City of New York was appointed committee of the property and estate of the said HELEN HALL VAIL without giving security, as by law provided, said appointment, however, being conditioned that said The Farmers' Loan and Trust Company, as such committee, would in all things faithfully discharge the trust imposed upon it and obey all directions of the Court in regard to the trust, make and render a just and true account of all moneys and other properties received by it and the application thereof, and of its acts in the administration of its trust whenever so
275 required to do by the Court; and

WHEREAS, the security required by said order of the committee of the person has been duly executed and approved, and the same duly filed and recorded in the Clerk's office.

NOW, THEREFORE, KNOW YE, that we have given, granted and committed, and by these presents do hereby give, grant and commit unto the said MaBelle Houghton Plumb, of the City of Haverford, State of Pennsylvania, the care and custody of the person of the said HELEN HALL VAIL, the incompetent person, and that we have given, granted and committed and by these presents do hereby give, grant
276 and commit unto the said The Farmers' Loan and Trust Company of the City of New York, the possession, care and management of the property and estate, real as well as personal of the said HELEN HALL VAIL, the incompetent person;

AND the said The Farmers' Loan and Trust Company is hereby required to return and file in the office of the Clerk of the Supreme Court in the County of New York during the month of January, 1927, a just and true inventory, with the affidavit required by law annexed thereto, of the entire estate, real as well as personal, of the said HELEN HALL

Plaintiff's Exhibit 7.

277

VAIL, the incompetent person, stating the income and profits thereof and the debts, credits and effects of the said HELEN HALL VAIL, so far as the same shall have come to the knowledge of the said The Farmers' Loan and Trust Company, and also to file in the office of the said Clerk annually thereafter a similar inventory and account, under oath, of the management of the said trust and of any other property and effects belonging to the said estate which it shall have since discovered, as required by the statutes and rules of this Court;

AND the said The Farmers' Loan and Trust Company 278
is hereby further required, out of the property and estate and out of any moneys which shall come into its hands after the payment of all the sums of money directed to be paid by the said order of confirmation and appointment, to provide for the support, maintenance, treatment and sustenance of the said HELEN HALL VAIL, and to provide for the proper maintenance, care and upkeep of the real estate belonging to the said HELEN HALL VAIL, so far as it receives income, funds or other property belonging to said incompetent person;

AND the said MaBelle Houghton Plumb, as such committee of the person of HELEN HALL VAIL, the incompetent 279
person, and the said The Farmers' Loan and Trust Company, as such committee of the property and estate of the said HELEN HALL VAIL, are hereby further required to obey and abide by all orders relating to said trust as may hereafter be made in our said Court, and to render a full and just account of the execution of the said trust and of the property, effects and estate which shall come into their hands when and as often as they shall be required so to do by our said Court or any court of competent jurisdiction;

AND YOU, the said MaBelle Houghton Plumb, committee of the person of HELEN HALL VAIL, the incompetent person,

280 *Plaintiff's Exhibit 7.*

and The Farmers' Loan and Trust Company, committee of the property and estate of the said HELEN HALL VAIL, the incompetent person, are hereby required so to provide for the said HELEN HALL VAIL, and to see that she is properly cared for in a manner suitable to her means and social position.

WITNESS, the HONORABLE CHARLES L. GUY, one of the Justices of the Supreme Court of the State of New York, at the County Court House in the County of New York, in the Borough of Manhattan, City of New York, this 25 day
281 of August, 1926.

WILLIAM T. COLLINS,
Clerk of the County of New York.

By the Court:

.....

Montgomery, Peabody & Grace,
Attorneys for MaBelle Houghton Plumb,
Petitioner,
282 15 William Street,
Borough of Manhattan,
New York City.

No. 16189

Plaintiff's Exhibit 7.

283

State of New York, }
County of New York, } ss.:

I, William T. Collins, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original certificate of

Commission to Committees.

on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original. 284

Indorsed Filed. Aug 25—1926

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 30 day of Aug 1926.

William T. Collins,
Clerk.

285

286 **Plaintiff's Exhibit 9.**

NEW YORK SUPREME COURT

NEW YORK COUNTY

In the Matter
of the
application of MABELLE HOUGHTON PLUMB
for an allowance to be paid herself and
others from the income accruing each
287 year to HELEN HALL VAIL, an incompetent person.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Your petitioner, MaBelle Houghton Plumb, respectfully shows:

I. That she is a daughter of HELEN HALL VAIL and resides at No. 411 Lancaster Avenue, Haverford, Pennsylvania.

288 II. That said HELEN HALL VAIL was, on the 11th day of August, 1926, duly adjudged to be incompetent to manage herself and her affairs, by a Sheriff's Jury of New York County, duly called to inquire into said matter, and that by an Order of the Supreme Court of New York County, entered on the 12th day of August, 1926, the findings of the said Sheriff's Jury were in all respects ratified, approved and confirmed, and your petitioner was appointed the Committee of the Person of said HELEN HALL VAIL, and The Farmers' Loan and Trust Company was appointed the Committee of her property. That both the Committee of the Person and the Committee of the Property of said HELEN HALL VAIL have

Plaintiff's Exhibit 9.

duly qualified and are now acting as such. That, as your petitioner is informed and verily believes, the said HELEN HALL VAIL is suffering from cerebral arteriosclerosis, with dementia, hallucinations and senile arteriosclerotic chorea, and that her condition holds out no hope for recovery.

III. That said HELEN HALL VAIL is seventy-four years of age and is a widow.

IV. That said HELEN HALL VAIL is the owner of the following parcels of real property, each one of which has erected upon it a private dwelling; one parcel situated at Geneva, New York, which has a value of about $86,000., one parcel situated at Spring Lake, New Jersey, which has a value of about $25,000., and one parcel at Palm Beach, Florida, which has a value of about $75,000.

That said parcels of real property produce no income.

That the contents of the private dwellings on the said real property are worth about $89,000.

That the said incompetent has jewelry worth about $176,000.

That the said incompetent is the life beneficiary of a Trust created by the Last Will and Testament of Charles F. Houghton, deceased, her first husband. That said Trust consists of the residuary estate of said Charles F. Houghton, deceased, and now produces an annual income in excess of Three Hundred Thousand Dollars ($300,000.00). That said income is now paid to The Farmers' Loan and Trust Company as Committee of the property of the said incompetent.

That the said The Farmers' Loan and Trust Company as Committee of the Property of the said incompetent has in its possession and custody securities belonging to

292 *Plaintiff's Exhibit 9.*

said incompetent, consisting of bonds and mortgages of a value of approximately Seven Hundred Thousand Dollars ($700,000.00) together with unexpended income from the said Houghton Trust in the sum of approximately Twenty-one Thousand Dollars ($21,000.00).

That the total income of the said incompetent from said Houghton Trust and from said securities amounts to approximately Three Hundred and Fifty Thousand Dollars ($350,000.00), per annum.

293 V. That the said HELEN HALL VAIL was married in 1878 to Charles F. Houghton, who died on the 30th of March, 1896. That in the year 1902 the said HELEN HALL VAIL was married to Charles Vail who died in the year 1922. That the said HELEN HALL VAIL has had three children, all by her first marriage, one of whom, Florence Houghton, died without issue; one of whom, Laura Houghton Harris, died leaving three children, John H. Harris now eleven years of age, William R. Harris now nine years of age and David F. Harris now six years of age; and your petitioner, who is the only other and surviving child of said HELEN HALL VAIL. That the
294 said infant children of said Laura Houghton Harris, deceased, reside with their Father, Ieuan Harris, at Geneva, New York, and that Ieuan Harris has heretofore been appointed the General Guardian of the said three children and has duly qualified as such.

That in and by his Last Will and Testament the said Charles F. Houghton, deceased, the Father of your Petitioner and of said Laura Houghton Harris, deceased, gave, devised and bequeathed his residuary estate in trust, and directed the Trustee thereof to apply the rents, income and profits thereof to the use of said HELEN HALL VAIL during her life, and upon her death to divide the same into two equal parts, and to apply the income

295

of one of said parts to the use of his daughter, the said Laura Houghton Harris, deceased, during her life, and the income of the other of said parts to the use of your petitioner, during her life; with a further provision, that upon the death of either of said daughters leaving issue her surviving, the part so held in trust for her should vest in her issue, share and share alike.

That your petitioner has one child, Joseph H. Plumb, Junior, who is now thirteen years of age.

That the said Laura Houghton Harris died on the 31st day of August, 1925, and that prior to said date the said Helen Hall Vail had been in the habit of contributing out of the income received by her from said Trust created for her benefit by the said Charles F. Houghton, deceased, the Father of your petitioner various annual sums for the support and maintenance of her two daughters, the said Laura Houghton Harris, and your petitioner.

296

VI. That the said Helen Hall Vail has the following brother and sisters and no others:

Edward Hageman Hall, 68 years of age, residing at 702 West End Avenue, New York City.

297

Mary Hall Taft, 79 years of age, residing at 425 Central Avenue, Orange, New Jersey.

Elizabeth Hall Burdick, 72 years of age, residing at "Reed House", 537 West 121st Street, New York City.

Abbe Fermi, 66 years of age, residing at Wolf's Lane, Pelham Manor, New York, and

Lucy Hall Ferris, 64 years of age, residing at Farrand Avenue, Highland Park, Michigan.

298 *Plaintiff's Exhibit 9.*

That prior to the time when the said HELEN HALL VAIL became incompetent she had been in the habit of contributing various annual sums to the support and maintenance of her above named brother and sisters.

That all of said brother and sisters are in very poor circumstances, particularly the said Mary Hall Taft, who is practically destitute, and it is necessary for their maintenance and support that the assistance which the incompetent formerly gave to them when she was mentally competent to understand the situation should be
299 continued.

VII. That the said HELEN HALL VAIL, the incompetent person, is now at Dr. Macdonald's House, Central Valley, New York where she was placed by your Petitioner. That there she has a sitting-room, bedroom and bath, and all the comforts which her position and affluence entitle her to have and are possible under the circumstances.

That the cost of maintaining the said incompetent at said Dr. Macdonald's House, supplying her with clothes and other necessities for her care and maintenance and for her pleasure could not, because of her condition,
300 exceed the sum of Fifty Thousand Dollars ($50,000.00) per annum.

That after the payment of said sum for the maintenance and support of said incompetent there will be left in the hands of The Farmers' Loan and Trust Company, as Committee of her property, annually a balance of income amounting to about Three Hundred Thousand Dollars ($300,000.00), a sum far in excess of that required to maintain said incompetent and to provide her with every comfort.

WHEREFORE your petitioner prays for an order directing The Farmers' Loan and Trust Company, as Committee

Plaintiff's Exhibit 9.

301

of the Property of said incompetent, to pay annually to the following named persons, from the surplus income received by it as such Committee, such allowances as to the Court shall seem reasonable and proper: To your petitioner, MaBelle Houghton Plumb, a daughter of said incompetent; to said Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, to be applied by him to the maintenance and support of the said infant grandchildren of said incompetent; to said Edward Hageman Hall, a brother of said incompetent; to said Mary Hall Taft, a sister of said 302
incompetent; to said Elizabeth Hall Burdick, a sister of said incompetent; to said Abbe Fermi, a sister of said incompetent, and to said Lucy Hall Ferris, a sister of said incompetent; and that there may be allowed your petitioner such a sum for counsel fees herein, as the Court thinks reasonable; and that such other and further relief may be granted to your petitioner herein as shall be deemed proper.

Dated, New York, October 8th, 1926.

MaBelle Houghton Plumb
Petitioner. 303

Plaintiff's Exhibit 9.

304

State of New York, }
County of New York, } ss.:

MaBelle Houghton Plumb, being duly sworn, says: That she is the petitioner named in the above entitled proceeding; that she has read the foregoing petition and knows the contents thereof, and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, she believes it to be true.

305

MaBelle Houghton Plumb

Sworn to before me this
8th day of October, 1926.

Samuel P. Simms
Notary Public Bronx Co. Ctf.
filed N. Y. Co. No. 150

306

Plaintiff's Exhibit 10. 307

SUPREME COURT,

NEW YORK COUNTY

IN THE MATTER *of* the Application of MABELLE HOUGHTON PLUMB for an allowance to be paid herself and others from the income accruing each year to Helen Hall Vail, an incompetent person	ANSWER AND CROSS-PETITION

308

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Farmers' Loan and Trust Company as Committee of the property of Helen Hall Vail an incompetent person, appearing herein by Geller, Rolston & Blanc its attorneys, for its answer to the petition herein of MaBelle Houghton Plumb, and for its own petition for affirmative relief herein, respectfully shows:

I. That said The Farmers' Loan and Trust Company is a domestic corporation and is the duly qualified and 309
acting Committee of the property of the above named Helen Hall Vail, having been duly appointed such Committee by an order of this Court duly made and entered on or about the 12th day of August, 1926.

II. That said Committee is informed and believes that said Helen Hall Vail has for many years been accustomed to contribute from her own funds towards the support and maintenance of certain of her relatives, as more fully set forth in the petition of MaBelle Houghton Plumb herein.

310 *Plaintiff's Exhibit 10.*

III. That said Committee is desirous of obtaining the instructions and directions of this Court as to whether or not the aforesaid contribution should be continued, and if so to what extent and for how long a time.

WHEREFORE the said The Farmers' Loan and Trust Company as Committee as aforesaid, respectfully prays that it be instructed and directed by this Court as to the course it should pursue as such Committee in respect of the matters and things set forth in the said petition of MaBelle Houghton Plumb and in this cross-petition, and that it
311 have such other or further relief in the premises as to this Court may seem just and proper.

Dated, New York, November 19, 1926.

THE FARMERS' LOAN AND TRUST COMPANY
As Committee of the property of Helen Hall Vail, an incompetent person

By W. B. CARDOZO
Vice President

Attest:

312 I. H. MEEHAN
Secretary.

GELLER ROLSTON & BLANC
Attorneys for The Farmers' Loan and Trust Company as Committee of the property of Helen Hall Vail an incompetent person.
22 Exchange Place,
New York, N. Y.

Plaintiff's Exhibit 10.

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STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

WILLIAM B. CARDOZO being duly sworn deposes and says: that he is a Vice President of The Farmers' Loan and Trust Company, the petitioner named in the foregoing answer and cross-petition; that he has read said answer and cross-petition and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

314

W. B. CARDOZO

Sworn to before me this
19th day of November, 1926

R. B. KNOX
Notary Public

315

316

Plaintiff's Exhibit 14.

SUPREME COURT

NEW YORK COUNTY

IN THE MATTER

of the

Application of MABELLE HOUGHTON PLUMB for the allowance to be paid herself and others from the income
317 accruing each year to HELEN HALL VAIL, an incompetent person.

165 Broadway
New York City.
December 15th, 1926.

Before: PHILIP J. DUNN, Referee.

Appearances:

MONTGOMERY, PEABODY & GRACE, Attorneys for Petitioner. Mr. Peabody and Mr. Montgomery, of Counsel.

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DEAN, KING & SMITH, Attorneys for Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris. Mr. King, of Counsel.

GELLER, RALSTON & BLANC, Attorneys for the Farmers Loan & Trust Co. as Committee of the property of Helen Hall Vail. Mr. Egan, of Counsel.

IT IS STIPULATED between the attorneys for the respective parties (counsel for guardian not objecting) that the statu-

Plaintiff's Exhibit 14.

tory fees of the Referee be waived; and it is further stipulated that Gertrude A. Trepold be employed as stenographer to take and transcribe the minutes of this reference and that she be paid the sum of 30¢ a folio for the original and 10¢ a folio for each copy furnished. 319

The Referee states that he has taken and subscribed the statutory oath.

Mr. Montgomery: This, Mr. Dunn, is an application made by the daughter of an incompetent for an allowance to herself and the three children of a deceased daughter. These three children of the other daughter and Mrs. Plumb, represent all the next of kin of the incompetent. 320 At the same time, Mrs. Plumb, the daughter of the incompetent, is applying for an allowance to the brother and sisters of the incompetent who are all people of practically no means.

We will show you that the income of the incompetent this year amounted to $637,990.95 and that prior years it amounted to somewhat smaller sums. We will put Mr. Marks on the stand to prove that when he get here.

I will offer in evidence, Your Honor, an order dated the 12th day of August, 1926 entered in Special Term of the Supreme Court, County of New York, which confirms the findings of the Sheriff's Jury that Helen Hall Vail is 321 incompetent to manage her own affairs and appointing Mrs. MaBelle Houghton Plumb the Committee of her person and the Farmers Loan & Trust Company as Committee of her property.

Received in evidence and marked Petitioner's Exhibit "1".

I offer in evidence the Commission to the Committees, that is, the Commission to the Farmers Loan & Trust Company as Committee of the property and to Mrs.

322 *Plaintiff's Exhibit 14.*

MaBelle Houghton Plumb as Committee of the person of the incompetent, dated the 25th day of August, 1926.

Received in evidence and marked Petitioner's Exhibit "2".

Doctor Henry Alsop Riley, witness called on behalf of the Petitioner, having been first duly sworn, testified as follows:

323 By Mr. Montgomery:

Q. Will you please state your full name? A. Dr. Henry Alsop Riley.

Q. And your address? A. 870 Madison Avenue.

Q. Your occupation, doctor? A. Physician.

Q. Are you a qualified examiner in lunacy? A. I am.

Q. Do you know Mrs. Helen Hall Vail, the incompetent in this proceeding? A. I do.

Q. When did you see her last? A. A week ago last Sunday—December 5th, 1926.

Q. Will you please state where you saw her? A. I saw
324 her at Dr. Macdonald's House at Central Valley, New York.

Q. And did you examine Mrs. Vail? A. Yes.

Q. For what purpose did you examine her, doctor? A. To determine whether the condition which we had previously found was still continuing.

Q. Did you find that condition continuing? A. We thought it was.

Q. Did you sign a certificate of lunacy? A. Yes, sir.

Q. Can you give the date of that certificate? A. That same day.

Q. Will you please state what Mrs. Vail's condition is? A. Physically she seems in good condition, but men-

Plaintiff's Exhibit 14.

325 tally she is very much the same as when we previously examined her. She had the same characteristics which she had before, that is, rather constant activity, constant talking, almost garrulous, going from one subject to another without any real continuity of thought. She showed some of the same apparent delusions which she had before about some members of her family and the attorneys with whom she came in contact. She remembered us and called us by name. Altogether she seemed in a somewhat delapidated mental condition.

326 Q. Is there any technical name for her trouble? A. We believe that she was suffering from an arterio-sclerotic condition which is a condition of the blood vessels of the brain. It is what is technically called senile dementia. She also had certain physical evidences; grimacing; irregular movements of the hands and feet, which we call senile chorea.

Q. Doctor, what in your opinion are the chances of Mrs. Vail's recovery? A. I think they are very slight. You mean to the extent of taking care of herself and her property?

Q. Yes. A. I would say there is practically no possibility of it.

327 Q. From your knowledge and experience in lunacy matters, doctor, do you believe Dr. Macdonald's House to be a suitable place for Mrs. Vail to be confined? A. Yes, I consider it a very nice place.

Q. A perfectly proper place under her financial circumstances as far as you know? A. Yes, sir.

Referee: How old is the incompetent?

Witness: She says she is seventy-one, but I believe she is seventy-four. At least that is what I was told when I saw her first. Between seventy-three and seventy-four.

328 *Plaintiff's Exhibit 14.*

Referee: How many examinations did you make?

Witness: This is the third time that I have seen her. I saw her twice in Trenton.

Referee: And the condition showed no improvement over the last examination.

Witness: I think she is a little quieter. I think she has adjusted herself to surroundings. It is quieter there than in Trenton. She didn't quite show the same amount of irritability which she showed at Trenton.

329 Referee: Is the disease from which she is suffering of a progressive nature?

Witness: It usually is, yes.

Referee: Is hers of a progressive nature?

Witness: It is such a short time, relatively speaking, and she has shown this adjustment, that I wouldn't say that the disease has shown any definite progression during the past four months.

Referee: These diseases, as a rule, are progressive in character?

Witness: Yes, sir, and quite slow.

Referee: You are satisfied that she is unable to take care of her property and of herself?

330 Witness: Yes, sir, I am.

Referee: Do you know what treatment she is getting down there at Dr. Macdonald's House at the present time?

Witness: I think it is mere physical care. There really isn't any treatment for that condition.

Referee: She has nurses—special nurses?

Witness: There was a nurse with her all the time we were there.

Examination by Mr. King:

Q. Doctor, did you testify who the doctor is who is in

Plaintiff's Exhibit 14.

charge of this sanitarium in which Mrs. Vail is staying? A. No, I didn't mention that. 331

Q. Who is in charge? A. Dr. Pilgrim.

Q. Do you know his first name? A. Charles Pilgrim.

Q. Do you know who had charge of that Sanitarium before Dr. Pilgrim assumed charge? A. No, I don't.

Q. Do you know whether it was Dr. Carlos Macdonald? A. I imagine it was, simply from the name, that's all.

Q. Dr. Carlos Macdonald specialized in mental cases? A. Yes.

Q. You know him by reputation? A. Yes, sir.

Q. He had a very well known reputation? A. Yes, sir. 332

Q. He specialized in mental and nervous diseases? A. Yes; he was a very well known alienist.

Q. Do you know whether that can be said of Dr. Pilgrim? A. I would say yes. He was formerly the head of the Lunacy Commission in Albany.

Q. Does he exercise personal supervision over this sanitarium where Mrs. Vail is staying? A. I should say so, yes. He was the one who directed the proceedings.

Q. He is familiar with Mrs. Vail's case? A. Oh, yes; I am sure so.

Q. In personal contact with her? A. Yes, sir.

333

Mr. Egan: No questions.

Referee: How long have you been engaged in practice?

Witness: Since 1912.

Referee: And you have been a commissioner in lunacy how long?

Witness: Almost the same length of time. Possibly three years later.

334 *Plaintiff's Exhibit 14.*

Referee: You make a specialty of that practice?
Witness: Yes.

HENRY ALSOP RILEY.

Sworn to before me this
24th day of December, 1926.

PHILIP J. DUNN
Referee.

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335 MARY HALL TAFT, witness called on behalf of the Petitioner having been first duly sworn by the Referee, testified as follows:

By Mr. Montgomery:

Q. What is your full name? A. Mary Hall Taft.

Q. And what is your residence? A. 425 Central Avenue, Orange, New Jersey.

Q. Do you know Mrs. Helen Hall Vail, the incompetent in this proceeding? A. I do, she is my sister.

Q. How old is Mrs. Vail? A. Mrs. Vail is seventy-one years old. She was seventy-one on the 2nd of last August.

336 Q. Will you please state what, if any, allowance Mrs. Vail has in former times granted to you. A. Mrs. Vail has been extremely kind to me. After my husband's death a number of years ago, she knew that I was left penniless and she gave me certain money then, and for nearly every year since she has given me from five to six hundred dollars in cash each year. In addition to that, a great deal of the time she has dressed me and given me other gifts; has taken me on beautiful trips and things of that kind.

Q. When did these allowances and gifts cease? A. Only this last year; well, I should say this present year.

Plaintiff's Exhibit 14.

Q. They ceased in 1925? A. Yes, the last gift from her was in November, 1925. 337

Q. Will you please state your age? A. Seventy-nine.

Q. What is your financial condition, Mrs. Taft? A. I have absolutely no resources now. For ten years after my husband's death, not immediately after, but when I was sixty-two I began to support myself and for ten years did so until the death of my oldest brother. Since that time I have been dependent entirely upon my relatives who have been exceedingly good to me.

Q. And largely upon the gifts that Mrs. Vail gave you? A. Well, things that Mrs. Vail gave me, and I want to give due credit to others, Dr. Hall and my sister who is dead. 338

Q. And those gifts which your other sister used to give you have now ceased? A. Yes, they ceased with her death. I have one dependent on me too.

Q. Who is that? A. My daughter.

Q. How old is she? A. Just fifty a month ago.

Q. And she depends upon you for support? A. She does.

Q. She is an invalid? A. There are times when she is able to do a little stenography and typewriting, but she earns very little—practically nothing. 339

Q. How many living brothers and sisters have you, Mrs. Taft? A. My brother Dr. Hall and four sisters.

Q. What are their names? A. Mrs. Burdick—

Q. What is Dr. Hall's address? A. Edward Hageman Hall, 154 Nassau Street.

Q. What is Mrs. Burdick's address? A. Reed House, 537 West 121st Street, New York City.

Q. And what is your other sister's name? A. Mrs. George H. Ferris.

Q. And her address? A. 210 Farrand Park Avenue, Highland Park, Michigan.

340 *Plaintiff's Exhibit 14.*

Q. Have you any other sisters? A. Mrs. Ferrin.

Q. And what is her address? A. 616 Wolfs Lane, Pelham Manor, New York.

Q. Are there any others? A. No, I have given you all.

Q. Mrs. Vail is the fourth sister? A. Yes.

Q. Mrs. Taft, this brother and these sisters of yours are the full brother and sisters of Mrs Vail? A. Oh, yes, one father and mother.

Q. Do you know, Mrs. Taft, whether your sister Mrs. Vail gave allowances to this brother and these sisters?

341 A. I know she gave one to Mrs. Ferris, whether she gave any to the others I do not know. I never had any idea that she had, but I think she made gifts from time to time.

Q. Do you know the financial condition of your sisters and brother? A. Yes.

Q. Will you please state that? A. I will begin with Mrs. Burdick. Mrs. Burdick is in the same position as I. She is a widow with no money of her own, no property of her own. She has four sons and they are only able to do moderately for her.

Q. Have they families of their own? A. Yes.

342 Q. How old is your sister, Mrs. Burdick? A. She is four and one-half years younger than I am.

Q. That would make it about 75? A. Yes.

Q. What is her physical condition, if you know? A. She is not well and strong, and I fear she is growing blind.

Q. So that she is unable to do any work? A. Oh, yes.

Q. The next sister? A. Mrs. Ferris. She is the widow of a missionary and is also in the very unfortunate position of being without any resources, and she has children, but her children are absolutely unable to do anything more than give her shelter. They cannot do anything in the way of money.

Plaintiff's Exhibit 14.

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Q. They can't clothe her? A. No.

Q. She is the one to whom Mrs. Vail made a gift annually? A. Yes.

Q. What is her physical condition, if you know? A. Well, not as good as mine. I am the oldest living.

Q. How old is Mrs. Ferris? A. She will be seventy-three in February.

Q. Please state the financial condition of your other sister, Mrs. Ferrin. A. So far as I know she is in very poor condition financially. Just what her husband left her I have never quite known.

344

Q. She is a widow. A. Yes she is a widow. Her husband died nearly three years ago and she is in such ill health that she has to have two nurses, a night nurse and a day nurse and she has used up all the property she had to pay for the expenses of this illness she has.

Q. Does she own her own home? A. Do you call it owning it when there is a mortgage on it.

Q. She has a home? A. Yes.

Q. And that has a mortgage on it. A. Yes.

Q. How much? A. It is a heavy mortgage.

Q. Do you know the amount? A. The mortgage I think at first was $13,000 but last year as some of her property didn't bring her anything and she had no other income she had to increase the mortgage.

345

Q. She had to borrow money to live on? A. Yes.

Q. And she borrowed by increasing the mortgage on her house? A. Yes.

Q. To get the money to support herself. A. Yes.

Mr. Montgomery: I now offer in evidence a letter from Lucy H. Ferris addressed to Mrs. Plumb which states the amounts of the allowances Mrs. Vail had been accustomed to give to Mrs. Ferris up to 1926.

346 *Plaintiff's Exhibit 14.*

Q. Mrs. Taft, will you please look at the signature and tell me if that is Mrs. Ferris' signature? A. Yes, that is her signature.

Mr. Montgomery: I offer it in evidence.

Letter received in evidence and marked Petitioner's Exhibit "3".

The letter—Plaintiff's Exhibit "3" reads as
347 follows:

"210 Farrand Park Avenue,
Highland Park, Michigan
November 9th, 1926.

My very dear MaBelle:

Your dear letter of the 4th came to me yesterday afternoon and last evening I looked up my old account books and found the figures which I knew I had kept.

I always keep an account of my daily expenditures, though small they may be and also all receipts of any kind, so I can turn at once to find
348 just such figures as you ask me to send to you.

In some instances I see that I did not note the date of receipt of a check from your mother but I have the months all right.

She was always, for some reason most generous to me and sent me additional gifts for some special expense but the annual gift or allowance never failed to come and could be depended upon.

After I came home from India and had resigned and with it lost my salary as a missionary, she of her loving accord said to me one day that as I was staying in this country, she should make me an annual gift, first it was some three hundred a year

Plaintiff's Exhibit 14.

paid in two or three installments and then later she said she would make just one gift in the fall of the year and so I give you the requested figures, as you ask for the past ten years. 349

In one of my many moves, I had a grand burning up of some old India account books and all of my accounts before 1914 unfortunately fell among the burned books.

1915—Apr.	.....	$200.00
Oct.	.....	300.00
Dec.	.....	300.00
1916—Apr.	.....	$200.00
June	.....	55.00
Oct.	.....	500.00
1917—Nov. 4th	.....	500.00
1918—Dec. 10th	.....	500.00
1919—Oct.	.....	500.00
1920—Oct.	.....	500.00
1921—Oct. 30th	.....	500.00
1922—Apr.	.....	$250.00
Nov. 4th	.....	500.00
1923—Oct. 1st	.....	500.00
1924—Apr.	.....	25.00
Oct. 4th	.....	500.00
1925—Nov. 16th	.....	500.00

350

351

All of these years I have felt most deeply affected by her generous gifts and several times I do not know what I could have done if it had not been for these gifts. Doctors, hospital and travel have taken so much of this money, that I have should have been desperate if it had not been for your mother's gifts to me. One thing she often said to me, that 'Lou, dear, you are the only one of the family who has never asked me for a cent'. That

352 *Plaintiff's Exhibit 14.*

is true for I never did say a thing to her about giving me a bit of any thing, except her love.

I do thank you from the bottom of my heart for your efforts to have the allowance continued to me and especially to sister Mary.

Always with dear love, I am as ever your Aunt

LUCY H. FERRIS

Please pardon this short first sheet. I find I had a bad error and so removed the portion."

353 Mr. Montgomery: I now offer in evidence a letter written by Abbe Ferrin Skinner to Mrs. Plumb dated November 29th. Will you please state who Mrs. Abbe Ferrin Skinner is, Mrs. Taft?

A. She is the daughter of Mrs. Ferrin, the only living child.

Q. Is Mrs. Ferrin's husband alive? A. No.

Q. When did he die? A. He died I think three years ago this February.

Q. Will you look at the signature of Abbe Ferrin Skinner and state if that is the signature of your niece? A.
354 Yes, that's my niece's signature.

Mr. Montgomery: I offer that in evidence.

Letter received in evidence and marked Petitioner's Exhibit "4".

The letter—Petitioner's Exhibit "4" reads as follows:

"Six hundred sixteen Wolfs Lane
Pelham Manor
New York

Plaintiff's Exhibit 44.

355

Nov. 29th

Dear MaBelle—

Your letter to Mother, will have to be answered by me, for as you know she is very ill. During the past ten years she remembers just one real gift of stock worth $5000. (She had received a diamond and sapphire ring some time previously, worth perhaps $1000 not to speak of many other gifts such as ermine furs etc.)

Of course during the latter years of Father's life, Mother didn't feel the need of any assistance. 356
But now that Father is gone, and Mother has been ill for a year and a half, with doctors and nurses care all the time, she has felt the need for money. So much so that she recently wrote and asked Aunt Helen to borrow some money. She refused to do this in her present abnormal state of mind. Of course Mother feels that if Aunt Helen's mind had been functioning properly she would have helped her, and that what she has done in the past ten years is not a criterion of what she would do if normal. Just as she can not see *your* need, she has not seen the need of any of her brothers or 357
sisters. None of them would want to even suggest any help from her, if they didn't feel as I do, that any such help would not interfere with her spending all she could possibly desire on herself.

Father always felt so keenly the fact of your Aunt Mary's almost living on nothing for so many years—scrimping and mending, and going away downtown to business at 70 years of age every single day till uncle Harry died. Father and Uncle Ned and Aunt Emily had to make a much felt hole in their pockets to fill the role that Aunt Helen could

358 *Plaintiff's Exhibit 14.*

have filled so easily without the *least* bit of sacrifice. Aunt Helen has had no sense of how most of us live at all for many years. She couldn't seem to conceive how cramped many of us are. She always felt we were quite well off.

You are the first one who should receive some help. It is a crime for you to not have some money to use from your dear Father's savings, who would not have wanted you to suffer from need when he had left that fortune in the bank.

359 How cruelly the laws do work!

Sincerely,

ABBE FERRIN SKINNER."

Mr. Montgomery: I offer in evidence a letter signed "Aunt Elizabeth" addressed to Mrs. Plumb dated November 5th, 1926. Will you please state who Aunt Elizabeth is.

A. That is my sister, Mrs. Burdick.

Q. Will you please look at the signature and the whole letter and see if it is in the handwriting of your sister?

360 A. Yes, that's her writing.

Mr. Montgomery: I offer that in evidence, it shows the allowances made by Mrs. Vail to Mrs. Burdick.

Letter received in evidence and marked Petitioner's Exhibit "5".

The Letter—Petitioner's Exhibit "5" reads as follows:

"Mrs. E. H. Burdick
Reed House

Plaintiff's Exhibit 14.

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537 West 121st Street
New York, N. Y.

November 5, 1926.

My dear MaBelle.

It is wonderfully fine of you to try to secure from your Mother's estate some assistance for your various aunts and uncle. Until very recently your mother contributed annually five hundred dollars to my income and occasionally sent me a check for two, four or five hundred dollars in emergencies.

362

It would give me immense pleasure to have any amount given to me and I certainly hope you will be successful in your efforts to put through your generous impulse.

I am glad to know you received both Harry's and Reginald's letters. They both mentioned to me that they had written to you. But not receiving any acknowledgement they feared their letters had miscarried.

All my sons carry the happiest remembrances of their visits to Corning and Geneva and have a large heart of love for you and sympathy for the ordeal you are going through.

363

You know my Reginald carries the Houghton name and his eldest son is named after him.—Reginald Houghton Junior—so we have ever before us a suggestion of your dear father and mother.

Reginald Houghton Junior is a great splendid boy of seventeen fine looking and good.

Thank you dear MaBelle for your interest in my behalf.

Your very affectionate

AUNT ELIZABETH."

364 *Plaintiff's Exhibit 14.*

Mr. Montgomery: I offer in evidence a letter signed "Edith" addressed to Mrs. Plumb. I might say that all these letters are not addressed to Mrs. Plumb, but to "MaBelle". Will you tell me, Mrs. Taft, who "MaBelle" is?

A. That is Mrs. Plumb.

Q. This letter is dated September 24th, Will you please tell me who "Edith" is? A. She is Mrs. William Twells Tiers.

365 Q. What relationship was Mrs. Tiers to your sister, Mrs. Vail? A. She is a niece—a daughter of our oldest sister who is dead.

Mr. Montgomery: We are not applying for an allowance for Mrs. Tiers, but the letter is introduced as corroborative evidence as to the necessity of an allowance to the brother and sisters of Mrs. Vail.

Letter received in evidence and marked Petitioner's Exhibit "6".

366 The letter—Petitioner's Exhibit "6" reads as follows:

"631 Esplanade,
September 24th.

Dearest Ma Belle,

How wonderful you are, and how thoughtful of everyone in writing news of your Mother to the family. Your letter came in this mornings mail, and covered everything so thoroughly that I am sure the ones to whom it was sent will deeply appreciate, as I do, being told about your decisions for poor Aunt Helen. It is all unspeakably pitiful.

Plaintiff's Exhibit 14.

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But is at least a relief for you to know that she can afford everything to make her comfortable.

It was delightful to have the talk with you on the telephone and so beautiful of you dear girl, to make the effort so generously to help the family financially. It will be a real Godsend to each one, and to me to be relieved of this terrible anxiety.

The dates of the births of the family are as follows.

Mary Hall Taft, August 2, 1847
Elizabeth Hall Burdick, February 18, 1852 368
Lucy Hall Ferris, February 21, 1854
Edward Hagaman Hall, November 3, 1858
Abbe Hall Ferrin, September 30, 1860.

I think in my haste to get off the night letter to you, that I did not state the ages correctly of Aunt Elizabeth and Uncle Ned. As telegrams sometimes make mistakes in words and figures, I will mention that Aunt Elizabeth's address is 537 West 121st Street. She has a very tiny room in the apartment of a woman who leases rooms. She has to go out for her meals, and I do not know how she will ever manage if he is ill, but as the Burdick 369 sons are able to advise her, I am not letting myself try to settle her problem of living. The sons give her an allowance, as much as they can afford, but she has to be very frugal, and is worried about her future with her failing eyesight. She has cataracts which are not at present operable. She fears blindness and before long the need of an attendant. (the following sentence appears in ink on the margin of the first page of the letter and evidently refers to this portion of the letter) I did not know my poor Aunt's eyes were in such a serious condition.

370 *Plaintiff's Exhibit 14.*

The matter of combining all the sisters under one roof has been talked of for a long time, when Mother was living, and Uncle Charlie Ferrin was alive, we had conferences by the hour, and all sorts of schemes were discussed. The Ferrins offered Aunt Mary a home if she would put Grace in an asylum. As there was not money enough available to pay for a private institution permanently—we did finance a stay at Bloomingdale for a while for observation—it meant a State Asylum for Grace,
371 and the authorities at Bloomingdale expressed the opinion that she was not insane enough to require confinement, and that an institution like the State Asylums would make her thoroughly insane. Aunt Mary felt she could not endure the humiliation of it, and a few years ago when she was quite ill, she wrote a plea to Mother and Uncle Charlie to promise that in case of her death, Grace should not be put in a State asylum.

The combination of sisters seemed unfeasable, as neither Aunt Lucy nor Aunt Elizabeth felt they could stand Grace, and as far as expenses went,
372 Aunt Lucy could live more cheaply by dividing her time among her children, though it means a slave's life, as they seem to use her as a servant to cook and wash and clean. Aunt Elizabeth's room and food would be about the same as she is now living, as it would to pay her share in a combination, and she is more independent. Uncle Ned cannot ask any of the sisters to live with him as Bert is not judged permanently insane, and he feels that he must keep a home ready for her whenever she is well enough to occupy it, and she gets very much excited and wrought up if he even asks a sister to stay with him while she is away, as having her

Plaintiff's Exhibit 14.

home invaded, and her place usurped. Aunt Elizabeth cannot cook and is not strong enough to do housework, even if Ned did invite her to live with him, supposing that Bert should be willing. Bert has an impoverished sister to whom Ned gives the same amount he gives Aunt Mary. After his living expenses are paid he has been in the habit of dividing what was left between his sister and hers. The amount to be so divided depends on what his expenses have been. With Bert in Bloomingdale, there is very little left, and I am not sure there will be any at the end of this year. He makes the distribution December 31st. I believe he divides it in thirds, and gives one third to Bert for trips to see Edwina and to get clothes. But he denies himself pitifully to achieve this surplus.

About three years ago, when Uncle Charlie Ferrin dropped out of the combination, and I saw how mother's money was vanishing, I suggested to Aunt Mary that she apply for a place in St. Luke's Episcopal Home, and try to have Grace go as assistant Housekeeper or in some capacity to pay her board, but the application was refused as the Board decided that she had a sister who could support her, Aunt Helen's gifts having been known, and her general affluence. To be admitted, it must be proved that the applicant has no relatives who can make any sort of provision whatever, for her maintenance.

I feel that Aunt Mary is living at a minimum, and I am sure that no boarding place would be willing to accept Grace. She is able to get substitute jobs, but only brief ones, for there are too many capable young women, who are not *off* in the upper story. Grace is quite good at housework

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and between them they get along with the most comfort for their money, and really the only way, with Graces peculiarities, is for them to have their own isolated little place.

They have been clothing themselves entirely on things sent by you, Laura and Aunt Helen—Abbe Frances and my clothes are so much worn when we are ready to discard them that they are not much use. So that while Aunt Mary has not had as much as $2500. and has made out, it is because
377 she has had gifts of clothes which she will not now receive, and in making a petition to the Court, it can be shown that owing to the deaths of various members of the family who contributed to the support of Aunt Helen's sisters, the burden would now have fallen on Aunt Helen alone, and under normal conditions she would have felt she must assume it, and certainly would have, since they have absolutely no other person to turn to.

I do hope my dear, though it is none of my business, that you will manage to petition for a proper allowance for yourself. Your Father never in-
378 tended you to be as hampered as you have been, and since your Mother will have everything that she requires, and may live for many years with the good care she is now having, you ought to be able to have what has been your due for years past. You are so extremely punctilious, that I fear you may not do yourself justice in the wish to not seem to be taking advantage of your Mother's state. So as your eldest cousin, do let me urge you to be just to your precious self and to what your Father would have wished for you.

Will you let me know what I shall do with the furniture, and do you want all four pieces—bed,

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bureau, chest of drawers, and small washstand which can be used as a dressing table? You must understand that they are a gift to you. Long ago both Aunt Helen and Laura offered to buy them, and if there was any way for Aunt Helen to buy them now for you, the money would be most convenient, but I am not willing to accept anything from you, and I am glad to feel they will be in the family. Abbe Frances has no space for them, and I would hate to have them sold to probably some awful Jew.

380

I have not had a chance to speak to Abbe Frances about the clothes, but I think they would be most acceptable in the present state of their finances. She can put a little color on them if she does not wish to wear all black. If you are clearing out any of your Mother's things, I know Aunt Mary and Grace can use them. If she has a superfluous evening wrap, I could use one.

I am glad that you have George, for you will know everything is being carefully safeguarded. And I hope that you will now have a little respite from anxiety and have good health and an easy mind to enjoy these coming years. They are the 381 best, the forties and fifties. One has youth enough to still enjoy adventure, and experience enough to know what to choose for the greatest satisfaction. If the law of averages holds, surely you have great brightness ahead.

May God give you all that you so richly deserve, dear girl. With a heartful of love to all three of you,

Devotedly yours,

EDITH."

Mr. Montgomery: That is all.

382 *Plaintiff's Exhibit 14.*

By Mr. Egan:

Q. What was the date of your husband's death? A. November 1, 1904

Q. So that the allowances have been made to you since that date? A. Yes.

That is all.

Mr. King: No further questions.

383 MARY HALL TAFT

Sworn to before me this
23rd day of December, 1926.

PHILIP J. DUNN.
Referee.

DOCTOR EDWARD HAGAMAN HALL, witness called on behalf of the petitioner, having been first duly sworn by the Referee, testified as follows:

By Mr. Montgomery:—

384

Q. What is your full name? A. Dr. Edward Hagaman Hall.

Q. Will you please state your address? A. 154 Nassau Street, New York City.

Q. You are the Doctor Hall, a brother of Mrs. Vail to whom Mrs. Taft referred in her testimony? A. I am.

Q. Did you hear Mrs. Taft's testimony? A. I did.

Q. With respect to the number of the brothers and sisters of Mrs. Vail? A. Yes, sir.

Q. That testimony was correct. A. That is correct.

Q. You heard the testimony of Mrs. Taft with respect

Plaintiff's Exhibit 14.

385

to the physical and financial condition of the sisters of Mrs. Vail now living? A. Yes.

Q. And that was correct? A. That was correct, sir.

Q. Mr. Hall, did Mrs. Vail prior to the time she was committed, give you an allowance? A. She gave me gifts at various times.

Q. Can you state what those gifts were? A. Subsequent to 1900 she gave me an aggregate of a little over $6250.

Q. Were those gifts made pretty regular each year? A. No, sir, at odd intervals.

386

Q. When did those gifts cease, Mr. Hall? A. The last gift was given me in 1918.

Q. Will you please state your age, Dr. Hall? A. Sixty-eight.

Q. Will you please state what your financial condition is? A. I am self-supporting. My income is derived mainly from my salary as secretary of two civic organizations, the Association for the Protection of the Adirondacks and American Scenic & Historic Preservation Society. I am married. I have had a good deal of illness in my family during the past fifteen years, and during the past three years and the past year over half of my income has been devoted to doctors and hospitals. By 387 economies and some personal self denials and going without recreation, I have been able to make both ends meet and have a few hundred dollars to give my sister.

Q. Would you mind stating what your salary is? A. The aggregate salary from these two organizations is $5700 a year.

Q. Out of that salary you have been assisting your sisters? A. Yes, sir.

Q. Contributing to their support? A. Yes, sir.

Q. And these sisters, you know, have no property and no income of their own? A. No, sir, not any.

388 *Plaintiff's Exhibit 14.*

Q. Except Mrs. Ferrin who owns the house in which she lives? A. That's right.

Q. But she had to increase the mortgage to make her ends meet? A. Yes, sir. Might I add in the record in regard to Mrs. Ferrin, something which Mrs. Taft did not. She is confined to her bed. She is bed-ridden. She cannot leave her room and has a nurse day and night.

Q. Do you know Mrs. Taft's daughter? A. I do.

Q. Do you know her physical condition? A. Yes, sir. Her bodily condition is fairly good, but her mental con-
389 dition is not.

Q. So that you know that Mrs. Taft's statement as to her inability to obtain and keep employment is true? A. Yes, sir.

Q. Mrs. Taft has to take care of her? A. Yes, sir.

Q. And support her? A. Yes, sir.

Mr. Montgomery: That is all.

By Mr. King:

Q. Mr. Hall, have you any independent income other than that you have testified to? A. I have a little income
390 from savings I put aside in lieu of life insurance, but that is all.

Q. And that amounts to what? A. That would amount to fifteen hundred or two thousand a year.

Q. In addition to the $5700 you have testified to? A. Yes, sir.

Q. Do you own your own home? A. No. I live in an apartment.

Referee: Can you give an outline of your family history:

Witness: Our father was Judge Hall. We were born in Auburn, New York, and our father was

Plaintiff's Exhibit 14.

Chief Justice of Colorado; he was made the first Chief Justice of Colorado during the Civil War by President Lincoln's appointment. He left us no means. My oldest sister and most of us had to be self-supporting. 391

Referee: Did he give everyone of you an education?

Witness: We only had a common school education and a high school education, but we have added to our culture by application. We have been lecturers and teachers and for my own part I am associated with the Cathedral of Saint John the Divine and with Bishop Manning on the Building Committee, and trying to do my part for the public welfare. Our means have not been equal to our social position, if you wish me to say that. 392

Mr. Montgomery: In other words, your means are not adequate to support you in the social position you are entitled to be supported in?

Witness: No, sir.

Referee: And that applies to your sisters also does it not?

Witness: Yes.

That is all. 393

EDWARD HAGAMAN HALL.

Sworn to before me this
23rd day of December, 1926.

PHILIP J. DUNN.
Referee.

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394 MaBelle Houghton Plumb, the Petitioner called in her own behalf, having been first duly sworn by the Referee, testified as follows:

By Mr. Montgomery:—

Q. Please state your full name? A. MaBelle Houghton Plumb.

Q. What is your address, Mrs. Plumb? A. 411 Lancaster Pike, Haverford, Pennsylvania.

Q. Mrs. Plumb, are you the daughter of Mrs. Helen
395 Hall Vail, the incompetent in this proceeding? A. I am.

Q. Will you please state how many times Mrs. Vail has been married? A. Twice.

Q. Whom did she marry the first time? A. Charles Frederick Houghton, my father.

Q. Whom did she marry the second time? A. Charles Delamater Vail.

Q. When did Mr. Houghton die? A. My father died March 29, 1897.

Q. Did he leave a last will. A. He did.

Mr. Montgomery: I offer in evidence certified
396 copy of the Last Will and Testament of Charles F. Houghton, deceased, Will dated the 20th day of March, 1893 and probated on the 17th day of April, 1897 in the Surrogates Court of the County of Steuben, New York. After one or two bequests the testator left the residue of his estate to the Farmers Loan and Trust Company to be held by them in trust during the life of his widow, the net income to be paid to her. After her death he directed that the estate should be divided into two equal parts and the income applied to his daughter Laura one-half and the other half to his daughter MaBelle and

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upon the death of said daughters, the share held in trust for each of them should vest in their issue, if any.

Received in evidence and marked Petitioner's Exhibit "7".

Mr. Montgomery: Letters Testamentary were issued under said will to the Farmers Loan and Trust Company and I offer in evidence a certificate of the issuance of letters.

Received in evidence and marked Petitioner's Exhibit "8".

Q. Mrs. Plumb, the daughter Laura mentioned in the will of your father is not now living is she? A. No, she is not.

Q. Did she marry during her lifetime? A. Yes

Q. Whom did she marry? A. Ieuan Harris.

Q. Did she leave any children? A. Three sons.

Q. Will you please give their names? A. John Houghton Harris, William Rees Harris and David Farnum Harris.

Q. And their father is who? A. Ieuan Harris.

Q. He is present here? A. Yes.

Q. MaBelle C. mentioned in the will is yourself? A. Yes.

Q. When were you married, Mrs. Plumb? A. June 22nd, 1912.

Q. And what is the name of your husband? A. Joseph Judson Plumb.

Q. Have you any children? A. One son.

Q. What is his name? A. Joseph Hudson Plumb, Jr.

Q. Did your mother have any other children besides

400 *Plaintiff's Exhibit 14.*

yourself and Mrs. Harris? A. One daughter, Florence, who died in infancy.

Q. You heard Mrs. Taft give the names and addresses of all of the living sisters and brothers of your mother, did you not? A. I did, yes.

Q. And that was correct? A. Yes.

Q. And you heard her testify as to their financial and physical conditions, did you not? A. I did.

Q. And that testimony was correct? A. Yes

Q. Do you know whether your mother has ever made a
401 will? A. Not to my knowledge.

Q. Have you asked any of the attorneys who ever represented her if they have ever drawn a will for her? A. Yes, I made all possible inquiries and I found no will. By "all possible inquiries" I mean all the people she had any legal business with.

Q. And the only living child of your mother is yourself. A. Yes.

Q. And her only living grandchildren are the three boys whom you have just mentioned, the children of her deceased daughter, Mrs. Harris? A. And my son—four grandsons.

402 Q. Did your mother at any time give you an allowance, Mrs. Plumb? A. Yes, she has.

Q. Will you please state what that allowance was? A. I have a little memorandum here to refer to if I may.

Q. Surely, you can read from it if you like. A. In the year 1912 my mother gave me an allowance of $1500. In 1913 she gave me $3000. In 1914 she raised that to $6000 and has continued that up to the past year or so.

Q. Did she give you any other presents besides those. A. Yes, she gave me gifts at the time of my marriage which amounted to $5100. At the time of my boy's birth she gave me various gifts which amounted to about $1600.

Q. When did you marry? A. I was married in 1912.

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Q. And did your mother's gifts cease when you married? A. No.

Q. They continued? A. They increased after I was married.

Q. Will you please continue giving the various allowances? A. Then in the year 1914 she gave me gifts amounting to $6,000 in cash.

Q. Anything else in that year? A. And in the year 1917 she gave me a house and a cash gift of $5,000. $30,000 was paid for the house. And last year in February she gave me a check for $5,000. It was not my allowance—it was a gift. She did things a little irregularly for the last year or so. 404

Q. When did her allowances to you cease? A. About a year or a year and a half ago.

Q. About the time you commenced to feel she was not herself? A. Yes.

Q. Did your mother give equal allowances to your sister while she was alive? A. Yes, whenever she gave my sister a gift of any kind she always gave me the same and vice versa.

Q. When did your sister die Mrs. Plumb? A. Last year.

Q. What property do you personally own, Mrs. Plumb? 405
A. I don't own anything.

Q. And you have no income of your own? A. No, nothing, except about $300 a year from the Farmers Loan and Trust Company from a small estate my father left to one of his sisters and that was to be divided between my sister and myself.

Q. Where is your mother now staying? A. At Dr. Macdonald's House, a sanitarium at Central Valley, New York.

Q. Has she been committed to that institution do you know? A. Yes, she has.

406 *Plaintiff's Exhibit 14.*

Q. Who placed your mother in the institution? A. I did.

Q. Did you make any arrangements with the institution for her care? A. Yes, I have a day nurse and a night nurse for her and I have arranged for her to have three rooms and a bath and that she shall have an automobile ride every afternoon that it is possible for her to go out.

Q. And have you arranged for medical attendance for her? A. Yes; the doctor there, Dr. Pilgrim sees her every day. Sometimes two and three times a day, and he reports to me weekly on her condition.

407 Q. Do you know what the amount will be needed yearly to maintain your mother at the institution? A. I couldn't answer that question intelligently now because she has only been there a short time, but I think the Farmers Loan and Trust Company can give you that information.

Q. You directed the institution to send the bills for your mothers maintainence to the Farmers Loan and Trust Company? A. Yes. I think Mr. Marks can give you the information.

Mr. Montgomery: That is all.

Mr. King: In lieu of an examination of Mrs.
408 Plumb, I will ask Mrs. Plumb if she will make a concession on the record which I will read to her.

STIPULATION.

The petitioner, MaBelle Houghton Plumb, at the request of Ieuan Harris, as General Guardian for John H. Harris, William R. Harris and David F. Harris, minors, makes the following concession and stipulation upon the record of this proceeding.

1. That the petitioner's father, Charles F. Houghton, died on or about the 29th day of March, 1897, and was

Plaintiff's Exhibit 14.

survived by his widow, Helen Hall Vail, the incompetent, and by his daughters, Laura Houghton Harris and MaBelle Houghton Plumb, the petitioner, his only next of kin. 409

2. That at the time of the death of the said Charles F. Houghton, the property and estate of Helen Hall Vail, the incompetent, was inconsequential in value or in amount except in so far as she benefited by the will of her said husband.

3. That at the time of the death of the said Charles F. Houghton, the petitioner and her sister, Laura Houghton Harris, were both minors, the former being of the age of 13 years and the latter 17 years; that both of them were then unmarried and resided with their mother, upon whom they were wholly dependent for support and maintenance. 410

4. That petitioner, MaBelle Houghton Plumb, continued to reside with her mother until her marriage to Joseph H. Plumb on or about the 22nd day of June, 1912, and her sister, Laura Houghton Harris, continued to reside with her mother until her marriage to Ieuan Harris on or about the 16th day of July, 1914. 411

5. That following the death of their father, Charles F. Houghton, and until their marriage, both the petitioner and her sister, Laura Houghton Harris, were wholly dependent upon their mother for maintenance and support.

6. That as issue of the marriage of MaBelle Houghton Plumb, there is but one child, Joseph H. Plumb, a minor, of the age of years, and as issue of the marriage of Laura Houghton Harris, there are three children, John H. Harris, a minor, aged 11 years, William R. Harris, a

412. *Plaintiff's Exhibit 14.*

minor, aged 9 years, and David F. Harris, a minor, aged 6 years.

7. That irrespective of the marriage of either daughter and the circumstance that each of them thereby acquired the marital right or support by their respective husbands, and irrespective of any other circumstance, arising out of the marriage of either daughter, their mother, Helen Hall Vail, the incompetent, both before and after the marriages of her daughters, consistently mainifested a disposition and intention to benefit equally the petitioner and her sis-
413 ter, Laura Houghton Harris, and any gift of money or property to one was coincident with and characterized by a gift substantially similar in kind, value and amount to the other daughter.

8. That since the death of Laura Houghton Harris, the sister of the petitioner, which occurred on or about the 31st day of August, 1925, the said Helen Hall Vail, has made no substantial gifts to or has otherwise granted to or conferred upon the petitioner any money, property, benefit or thing of value.

The petitioner therefore consents and agrees, in the
414 event that she survives her mother and thereby becomes entitled to a share of the latter's estate, either by the will or intestacy of the said Helen Hall Vail, any such share shall be charged with any allowance which may be awarded to the petitioner in this proceeding to the extent, if any, by which such allowance exceeds in value or in amount, the aggregate of any allowance or allowances which may be awarded in this proceeding to the General Guardian of the said infants, John H. Harris, William R. Harris, and David F. Harris, minors, and

The petitioner further consents and agrees that any order, which may be made in this proceeding, awarding

Plaintiff's Exhibit 14.

415

an allowance to this petitioner, shall be conditioned in accordance with this stipulation and shall provide that any award thereunder shall be allowed to the petitioner only by way of advancement, and, as such, shall be accepted by the petitioner.

Mr. Montgomery: It is rather difficult for Mrs. Plumb to answer that and I would like to read the answer for her which she will adopt.

Mrs. Plumb is willing and agrees that the order granting the allowance shall contain a direction that if the amounts paid to her exceed the total amounts paid to the infants, that the excess shall be considered as an advancement provided that the order shall direct that if the total amount paid to the infants shall exceed the amount paid to her that the excess paid to the infants shall be considered also as an advancement. In other words, it shall work both ways. 416

Mr. King: I think that is entirely agreeable to the general guardian of these infants, and as a matter of fact, to the attorneys, but as I understand it, the general guardian cannot stipulate and that is the reason I am unwilling to enter into such a stipulation. 417

Mr. Montgomery: I think that what I read should be amended to this extent: "Any amounts paid to the infants or the general guardian on their behalf".

No examination of Mrs. Plumb by Mr. Egan.

Referee: (To Mrs. Plumb) You approve of this application, do you not?

418 *Plaintiff's Exhibit 14.*

Witness: Yes, I do.

Mr. Montgomery: When did Mr. Vail die, Mrs. Plumb?

Witness: About 1922.

Mr. Montgomery: So that your mother is a widow again?

Witness: Yes.

Referee: I understand you to say that you approve of this application?

Witness: Yes I do.

419 Referee: You understand what the proceeding is all about.

Witness: I do, Mr. Dunn, yes, and I think that the whole thing seems just right to me.

Mr. King: Mrs. Plumb, in the course of your testimony you referred to income you received from a little estate which was provided for in your father's will for one of your aunts.

Witness: Yes.

Mr. King: I think I understand that the life interest of your aunt has fallen in by her death.

Witness: Yes.

420 Mr. King: Will you look at paragraph "FOURTH" in your father's will which has been put in evidence and tell me if that is the source of the income to which you have referred?

Witness: Yes, that's it.

Mr. Montgomery: And the three grandchildren —the children of your sister Mrs. Harris also receive one-half of that income? Is that correct?

Witness: Yes, it is divided among them.

Referee: Is your boy going to school now?

Witness: Yes, he is going to school.

Referee: Where is he going to school?

Plaintiff's Exhibit 14.

421

Witness: He is going to Montgomery Day School near us in one of the suburbs of Philadelphia, and I hope to be able to send him to boarding school next year.

Referee: And if you get an allowance in these proceedings it will enable you to give him a better education.

Witness: Yes, we will be able to give him a good many advantages, because we will have more means.

Mr. Montgomery: And you cannot give him those advantages unless you do get the allowance? 422

Witness: No, we wouldn't be able to.

That is all.

MaBelle Houghton Plumb.

Sworn to before me this
23rd day of December, 1926.

Philip J. Dunn
Referee.

Mr. Montgomery: I offer in evidence Notice of this hearing with proof of due service on all parties. 423

Received in evidence and marked Petitioner's Exhibit "9".

Mr. Montgomery: I offer in evidence copy of the Petition in this proceeding, the original of which is on file in the office of the Clerk of the County of New York.

Received in evidence and marked Petitioner's Exhibit "10".

424 *Plaintiff's Exhibit 14.*

Mr. Egan: I offer in evidence the Answer and Cross Petition of the Farmers Loan and Trust Company as Committee of Helen Hall Vail praying for instructions of the court in this matter.

Received in evidence and marked Committee's Exhibit "A".

Ieuan Harris, General Guardian of the infants John
425 Houghton Harris, William Rees Harris and David Farnum Harris, having been first duly sworn by the referee, testified as follows:

By Mr. King:

Q. Where do you reside, Mr. Harris? A. Geneva, N. Y.

Q. Has that been your home for some time? A. Yes.

Q. You are the husband of Laura Houghton Harris who has been mentioned in this proceeding? A. Yes.

Q. She is now dead? A. Yes.

Q. What is the date of your marriage? A. July 16th,
426 1914.

Q. What was the date of your wife's death? A. August 31st, 1925.

Q. And during your married life did you live at Geneva, New York. A. Most of the time.

Q. Are there any children of the marriage? A Three boys.

Q. And those three boys are the infants in this proceeding? A. Yes.

Q. Will you please state their names and their ages? A. John Houghton, eleven, William Rees, nine David Farnum, six.

Plaintiff's Exhibit 14.

427

Q. During your married life, did Mrs. Vail also live at Geneva, New York? A. Yes.

Q. And she was your neighbor there? A. Yes.

Q. At all times during your married life, were your means of such a character that you were able to provide for the education, support and maintenance of your family? A. Yes.

Q. And at the present time? A. Yes.

Q. And at no time were you ever dependent upon Mrs. Vail for support? A. No.

Q. Following the death of Laura Houghton Harris, 428
were you appointed guardian of these children? A. I was.

Mr. King: I offer in evidence exemplification of the record of the Surrogate's Court of Ontario County appointing Mr. Harris guardian of his three minor children who are named as infant parties to this proceeding.

Received in evidence and marked General Guardian's Exhibit "I".

Q. Upon the death of Mrs. Harris, did she leave a will? A. Yes. 429

Q. I refer to Laura Houghton Harris? A. Yes.

Q. Are you executor of that will? A. Yes.

Q. And that will provides, does it not, that you are the sole beneficiary? A. Yes.

Mr. King: I offer in evidence exemplification of the record upon the probate of the will of Laura Houghton Harris in the Surrogates Court of Ontario County. The only reason why I offer this will in evidence is because of any presumption that possibly Laura Houghton Harris died intestate

430 *Plaintiff's Exhibit 1½.*

and that these children thereby acquired some interest in her estate.

Received in evidence and marked General Guardian's Exhibit "II".

Q. Following the probate of the will of Laura Houghton Harris, was her estate appraised? A. Yes.

Mr. King: I offer in evidence certified copy of
431 the order appraising the estate of Laura Houghton Harris dated March 2nd, 1926. It appears from this appraisal that the value of the estate was $50,696.25.

Received in evidence and marked General Guardian's Exhibit "III".

Q. Included in that estate was there any real estate? A. Yes.

Q. Is that real estate the home in Geneva which you occupy and which is known as "Fairfield"? A. Yes.

Q. Do you remember the appraised value of that real
432 estate? A. $30,000.

Q. Did that home ever belong to Mrs. Vail? A. Yes.

Q. And was it given by her to her daughter Laura? A. Yes.

Referee: Was it given about the same time that she gave Mrs. Plumb the house valued at $30,000?

Witness: I think roughly it was about 1916 or 1917.

Mrs. Plumb: She gave me mine in 1917.

Referee: They were both of the same value?

Witness: Roughly about the same value, yes.

Referee: In other words, she tried to give to both daughters equally?

Plaintiff's Exhibit 14.

433

Witness: Yes.

Q. While Mrs. Vail resided in Geneva was she a frequent visitor at your home? A. Yes.

Q. She was familiar with your circumstances and the manner in which you lived? A. Yes.

Q. Did she make an allowance to her daughter? A. Yes.

Q. Do you recall whether or not she made them at periodical intervals? A. Yes, as a rule. Until latterly, we couldn't depend upon the date exactly.

434

Q. Have you any knowledge of what those amounted to? A. At first it was $5000. a year and she increased it to $6000.

Q. And it has always been her practice to make a corresponding allowance to her other daughter, Mrs. Plumb? A. Yes.

That is all.

Referee: Are your boys going to school?

Witness: The two older ones. The youngest one is at home—he is only six years old.

Referee: What school do they go to?

Witness: Repton School, at Tarrytown, New York.

435

By Mr. King:

Q. Mr. Harris, the value of your bond as guardian as appears from the exemplification of the guardianship record which has been put in evidence, fixes the value of your children's property at $2500. each? A. That's right.

Q. Do you know how that was arrived at? A. That comes from a trust fund set up by Mr. Houghton in favor of his sister Catherine S. Houghton and upon her death was to be divided among Mr. Houghton's two daughters.

436 *Plaintiff's Exhibit 14.*

Q. Your children have succeeded to the share of their mother? A. Yes, $7500, all told.

Q. And this trust fund that you refer to is the same trust fund that I asked Mrs. Plumb about? A. Yes.

Q. So that each child has $2500. A. Yes, sir.

Q. Has that money ever been received from the Farmer's Loan and Trust Company? A. No.

Q. Aside from these moneys, have your children any other property of their own for which you are guardian? A. No.

437 Q. Or for which anyone else is guardian? A. No.

Q. Have they an interest in any other estate or in the estate of their grandfather, Charles F. Houghton. A. Only after the death of their grandmother, Mrs. Vail.

Q. That is the only estate? A. Yes.

Q. You provide for all their needs? A. Yes.

Q. And except as you have testified, they have no other property. A. No.

That is all.

IEFAN HARRIS.

Sworn to before me this
7th day of December, 1927.

438 PHILIP J. DUNN
Referee.

ALEX D. MARKS, witness called on behalf of the Petitioner, having been first duly sworn by the Referee testified as follows:

By Mr. Montgomery:

Q. What is your occupation? A. I am an employee of the Farmers Loan and Trust Company. I am a member of the Trust Department.

Plaintiff's Exhibit 14.

439

Q. The Farmers Loan and Trust Company being the Trustee under the will of Mr. Houghton, deceased? A. Yes, sir.

Q. Mr. Marks, will you please state what the annual income has been upon the trust created for the benefit of Mrs. Helen Hall Vail since 1923, the gross income by the year? A. The gross income payable to Mrs. Vail during the year 1923 amounted to the sum of $240,209.22, and for 1924, $252,395.27, and for 1925 $308,732.20, and for the year 1926 up to the close of business as of the 9th of December, 1926—$651,692.82.

440

Q. Mr. Marks, will you please state, if you can, the amount of accumulated income received from the estate of Charles F. Houghton payable to Mrs. Helen Hall Vail on hand at this time? A. $812,445.57.

Q. Can you state what it was on August 3rd, 1926 about the date when Mrs. Vail was declared to be incompetent to manage her own affairs? A. $757,214.25.

Q. So that from August 3rd, 1926 to December 9th, 1926, the accumulated income has increased by what figure? A. $55,231.32.

Q. From August 3rd, 1926 to December 9th, 1926? A. Yes.

441

Q. That is, after making all payments? A. Yes, after making all payments for expenses for Mrs. Vail and other expenses of administration.

Q. What were those expenses? A. In the first place, the expenses of having the Trust Company appointed Committee of her property, fees paid to the doctors in that connection and to the lawyers, and the expenses of maintaining Mrs. Vail at Dr. MacDonald's House at Central Valley, New York.

Q. Can you state what the expenses of maintaining Mrs. Vail at that institution have amounted to? A. We paid three bills to date, but it has just gotten started.

442 *Plaintiff's Exhibit 14.*

On November 8th we paid the sum of $1040.69, and on December 1st we paid $1165.64, and for half the month of September $463.47.

Q. That was all paid to Dr. MacDonald's House at Central Valley? A. Yes, sir.

Q. Can you testify when Mrs. Vail went to that institution? A. September 16th, 1926.

Q. And the cost of maintaining Mrs. Vail at Dr. MacDonald's home would amount to about how much per month? A. You mean the actual expenses at Dr. Mac-
443 Donald's House?

Q. Yes? A. Certainly as much as $1200 a month. Possibly a good deal more. I don't know exactly.

Referee: Why do you say "possibly a good deal more"?

Witness: I suppose she might be sick which will incur further expenses; perhaps an occasional $100 for doctor's bills. It might be $1500 a month.

Q. But you feel sure it will never exceed $2000 a month, don't you? A. Yes, I do.

Q. Are there any other expenses which you have in-
444 curred since your appointment as Committee of the property of Mrs. Vail outside of legal expenses, etc. necessary for the proceeding to have Mrs. Vail declared an incompetent, and the expenses at Dr. MacDonald's Sanitarium? A. There haven't been very many. There are several things purchased for Mrs. Vail of a minor nature. Flowers have been sent to her by Mrs. Plumb. There are several bills of that kind to be paid.

Q. I just mean any expenses you have been put to aside from those I just mentioned? A. We had to have the real estate and personal effects appraised. We have been paying taxes on the property—on the real estate.

Plaintiff's Exhibit 14.

445

Q. How much are the taxes on the real estate? A. I am not in a position to state just what the amount of the taxes is? We don't know the exact amount. I could find out by telephoning—by calling up our real estate department. I don't think that they have paid yet. I think I saw one tax bill—something like $1200. that went through the ledger on one of the properties.

Q. Do you know what property Mrs. Vail owns outside of this accumulated income? A. She has a big house at Geneva, New York, and a very much smaller place at Spring Lake, New Jersey. She has a home at Palm Beach, Florida, with personal effects in all these houses.

446

Q. You are not in a position now to state just what it costs to maintain those per year? A. No, I am not. I do not know how much it will cost. I cannot state just how much it will cost to maintain them a year. We haven't spent much on them to date. We don't know how much it will cost to maintain them a year.

Q. Would it exceed $5000. a year? A. Why, I don't believe we can predict that in advance due to the condition of the property at Palm Beach. It would be hard to say how much. I think it will be a very small ratio to the amount of the total income which Mrs. Vail has.

447

Referee: Do you know the appraised values of these properties?

Witness: Yes, I can give you those: The property at Geneva, New York was appraised for $140,577.65; consisting of land, $20,500; buildings and building fixtures, $66,075.90; furnishings and fixtures, $54,001.75. The property at Spring Lake, New Jersey is appraised at $50,953.30, consisting of land, $21,500, building and building fixtures, $23,757.30, furnishing and fixtures, $5,696. Property at Palm Beach, Florida was appraised at

448 *Plaintiff's Exhibit 14.*

$433,862.83 consisting of land, $351,400.; buildings and building fixtures, $66,772.93; furnishings and fixtures, $15,689.90. The appraisal was made by the American Appraisal Company.

Q. Are those properties bringing in any income? A. They are bringing in no income.

Referee: Any mortgages on them?

Witness: No, sir.

449 Mr. Egan: What is the date of the appraisal?

Witness: I haven't got it. We just had these appraised about the 1st of October.

Q. Mr. Marks at this date you are not able to accurately state how much it is going to cost to maintain Mrs. Vail at the institution? A. Well, looking at these figures here, it would look as if it would cost about thirteen or fourteen thousand a year. Of course I cannot predict that definitely. It might cost more, but from the bills of Dr. Macdonald's House it would appear—

Q. You have no reason to believe that they may be larger? A. No.

450

Referee: What about the jewelry.

Witness: We have some jewelry.

Referee: What is the appraised value of the jewelry—what does it consist of?

Witness: $177,418.

Referee: Probably you can tell us what the principal of that trust is from which she derives that income. What does that amount to?

Witness: Why I couldn't tell you the exact value of the principal of the trust for the reason that it mostly consists of the stock of the Corning Glass

Plaintiff's Exhibit 14.

Works. We are not in a position to state the exact value of that stock. The estate owns some real estate in Duluth of a relatively small amount, and some securities of a relatively small amount compared with the stock of the Corning Glass Works, which is very valuable. It is very closely held and we don't know anybody that is in a position to state exactly what it is worth. 451

Referee: Didn't you ever figure out how much the gross was worth.

Witness: Not the Corning Glass Works stock. Everything but the Corning Glass Works stock. The market value of the securities held as trustee under the will of Charles F. Houghton, which were appraised as of last August, was $617,148.13, but that doesn't include the Corning Glass Works stock. 452

Referee: Outside of that they had $617,148.13 worth of securities?

Witness: Yes.

Referee: And you have no idea what the Corning Glass Works stock is worth.

Witness: I think it is worth a good deal of money. I cannot tell you exactly what it is worth.

Referee: You mean to say there is a very large income coming in all the time from Corning Glass Works stock? 453

Witness: Yes.

Referee: Was there never an appraisal made of that stock?

Witness: Not so far as I know. Of course I suppose it must have been appraised in the transfer tax proceedings when Charles F. Houghton died back in 1897.

Referee: But it has changed since then?

Witness: Yes.

454 *Plaintiff's Exhibit 14.*

Q. The stock is held privately and nobody will sell it, isn't that it? A. There is hardly any market for the stock that is true. Hardly anybody wants to sell it.

Q. It is so valuable? A. Yes.

Mr. Egan: The income doesn't represent any stated percentage on the investment—say 5% or 6%?

Witness: No, on account of extra dividends. This last year there have been over five hundred
455 thousand dollars in dividends.

Referee: Has the common stock of that company any par value?

Witness: No par value.

Referee: How many shares of stock are there in the estate?

Witness: 40,320. of common stock of the Corning Glass Works.

Referee: Any preferred stock?

Witness: Yes, sir.

Referee: How many shares?

Witness: 5040.

456 Q. What is the par value of the preferred stock? A. $100 par.

Q. Have you searched for any will of Mrs. Vail? A. Yes, I have.

Q. What have you done? A. I went through and had others go through all the records of the Farmers Loan and Trust Company having reference to wills and we have no record of any will for Mrs. Vail. We have no copy of any will of Mrs. Vail. I also called on our attorneys, Geller, Ralston & Blanc and Mr. Capron of that firm consulted his records and he stated that they have no record of ever having drawn a will for Mrs. Vail.

457

Q. Were they attorneys for Mrs. Vail as far as you know? A. I don't know.

Q. They were the attorneys for the estate of Charles F. Houghton? A. Yes. I Understand that Mrs. Vail consulted them. I simply went there knowing that many of our clients go to our attorneys to have wills drawn.

By Mr. King:

Q. After the Farmers Loan and Trust Company was appointed Committee, did it take an inventory of the Committee's property—of Mrs. Vail's property? A. Yes. 458
We had the American Appraisal Company appraise all the real estate and inventory all the personal effects at Geneva and at Palm Beach and Spring Lake, and then Mrs. Vail's jewelry was appraised by a firm here—Samuel Marx, Inc. I went up with one of their appraisers to Geneva and he appraised all the jewelry which she had there, then the property which was appraised was appraised by the American Appraisal Company.

Q. Have you that inventory with you? A. No, it is a big thing. I gave you the total values there.

Q. Did you put that on the record? A. Yes, Mr. Dunn asked me for it.

459

Q. At the time of the appointment of the Farmers Loan & Trust Company there was a large amount of accumulated income in the possession of the Farmers Loan & Trust Company as trustee which had not been paid over to Mrs. Vail? A. Yes.

Q. What did that amount to at that time? A. I have testified to that—$757,214.25.

Q. Then your testimony was that the net income had accumulated to the extent of about $50,000. within the last few months? A. Yes, sir.

Q. Aside from this income which was in the hands of the Farmers Loan & Trust Company, was there any

460 *Plaintiff's Exhibit 14.*

stock which belonged to Mrs. Vail which came to you from some other source? A. Not to amount to anything at all. There were a few stocks there of no value. I don't think there was anything worth anything. She had some bank balances in banks—a balance in Palm Beach and at Spring Lake—very small. That is all there was.

Q. Substantially all the property which she had at the time of the order adjudicating her an incompetent was in the hands of the committee? A. Yes. And the contents of the houses and a few odds and ends which we found—
461 they don't amount to anything at all. Some furs at C. C. Shayne & Co., some ivory and ivory sets at Black, Starr & Frost and some carpets at the Knickerbocker Cleaning Co.

Q. I am just interested in the securities? A. There were none, except those we found among her personal effects. They had some very small value. They were worth several thousand dollars.

Q. How many? A. Well, there were ten shares of Hawley Motor Company preferred valued at $100.00; 2½ shares of the Ontario Coal Company common stock valued at $172.50; ten shares preferred stock of the Ontario Coal Company, valued at $1210.—50 shares of the Thompson,
462 Holmes & Converse, preferred, worth $2500. There were several other securities which were valued by our statistical department as worthless.

Q. Are the arrangements for Mrs. Vail's care and comfort made by the Trust Company? A. Mrs. Plumb makes the arrangement for her care and comfort and the bills are sent to us and we pay them from Mrs. Vail's property in our hands.

That is all.

ALEXANDER D. MARKS.

Sworn to before me this
23rd day of December, 1926.

PHILIP J. DUNN

Plaintiff's Exhibit 14.

463

MRS. MABELLE H. PLUMB, recalled.

Mr. Montgomery:

Q. Did you, outside of asking the various people and attorneys, make a search among your mother's effects for a will? A. Yes, I did.

Q. And you found none? A. I found none.

Referee: You went through her home where she was living?

Witness: Yes, all three of her homes, because 464
until I was appointed guardian I had to take care of her belongings, and I asked three or four different lawyers with whom she did business, and asked the Farmers Loan & Trust Company, and followed up every avenue that I could think of.

Referee: Has she a safe deposit vault?

Witness: I don't think she had one. I understand from her man George, who has been a servant in her employ for a good many years that she wouldn't trust anything in the banks. He would know.

Referee: So far as you know she had no safe 465
deposit box?

Witness: George said there was no safe deposit box.

Referee: You found no keys or bills from safe deposit company among her papers?

Witness: No.

Q. Do you know who was formerly her attorney at Geneva? A. Latterly she would have one and then another. She wouldn't give her business to any one particular lawyer.

466 *Plaintiff's Exhibit 14.*

Q. Did you make inquiry of them? A. Yes. There were two of them.

Q. What are their names? A. L. Guy Hoskins and Mr. Smith O'Brien.

Mr. King: They are two leading lawyers in Geneva, are they not?

Witness: Yes.

Q. And they took care of the affairs of your mother?
467 A. They are the only ones that mother has employed there.

Q. You inquired of both of them? A. Yes.

Q. What did they say? A. That they know nothing of any will. I didn't do that myself; it was done for me. That is all.

MABELLE HOUGHTON PLUMB.

Sworn to before me this
23rd day of December, 1926.

PHILIP J. DUNN
Referee.

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468 JOHN D. PEABODY, witness called on behalf of the Petitioner having been first duly sworn by the Referee, testified as follows:

By Mr. Montgomery:

Q. Did you call upon any attorneys in New York to ascertain if they knew whether Mrs. Vail had made a will? A. I did.

Q. Will you please state who they were and what they said. A. I was advised by Mrs. Plumb that Mrs. Vail in the past had employed Mr. Charles E. Hughes, and I

Plaintiff's Exhibit 14.

called upon Mr. Hughes, Jr. and asked him whether he had any record of having made any will for Mrs. Vail and he said no. 469

Q. Did you call upon anybody else? A. No.

Q. Your firm never made a will for Mrs. Vail, did it? A. No.

JOHN D. PEABODY

Sworn to before me this
23rd day of December, 1926.

PHILIP J. DUNN
Referee. 470

FREDERICK P. KING, witness called on behalf of the Petitioner, having been first duly sworn by the Referee testified as follows:

By Mr. Montgomery:

Q. Mr. King, did you know Mrs. Helen Hall Vail, the incompetent in this proceeding? A. Yes.

Q. How many years have you known her? A. I have known Mrs. Vail about 30 years.

Q. Did you ever draw a will for her? A. I never did. I might volunteer the information that sometime in the last few years there was a proceeding which was instituted by the Farmers Loan and Trust Company to construe the will of Charles F. Houghton, deceased, as to the authority of the trustee to continue to carry the stock of the Corning Glass Works and for instructions to the trustee. In that proceeding I represented the interest of Laura Houghton Harris who was then alive, and the interest of Mrs. Vail, the life beneficiary was represented by Charles E. Hughes, Sr. until during the course of that 471

472 *Plaintiff's Exhibit 14.*

proceeding he became Secretary of State, after which she was represented by Charles E. Hughes, Jr.

FREDERICK P. KING.

Sworn to before me this
7th day of January, 1927.

PHILIP J. DUNN—Referee.

Mr. Montgomery: I think we have covered the best way we can, the question of Mrs. Vail not having made a
473 will.

In closing I would like to state that this application for allowances we feel should be granted. We are asking an allowance to Mrs. Plumb of $50,000. annually, an allowance to the children, an allowance totaling $50,000. to be divided between the three of them, and an allowance of $2,400. to Mrs. Taft and $2,000. to each of the other sisters and brother.

From the testimony it appears that the average income for the last four or five years has been about $318,000. The total sum required to maintain Mrs. Vail at this date it is impossible to state approximately, but it certainly
474 will not reach on the outside $50,000. a year, thus leaving a balance of over $250,000. of income. The number of years that this trust has been in existence, the income has accumulated so that it is now considerably over $800,000. as shown by the testimony. That accumulated income is all invested and is bearing income itself. The real estate in Florida is valued in the neighborhood of about $433,000., and that we desire to sell as soon as possible so that when that is sold and invested it is fair to assume that the income would increase by about 5% of that amount or about somewheres in the neighborhood of $25,000. additional.

Plaintiff's Exhibit 14.

There is no question about the necessity of these allowances being granted so that the respective people to whom they are granted may continue to live in the way in which their social position and income of their mother really entitles them to live. 475

If Mrs. Vail were competent she would undoubtedly give them each a large allowance as she did while she was competent and up to within a year ago. In addition to that, Mrs. Vail's heirs-at-law, that is, her only surviving child and the guardian of the three grandsons who take the place of her deceased daughter, are perfectly willing that the allowances requested should be granted to the sisters and the brother of Mrs. Vail. Mrs. Plumb and these three grandchildren will divide between them upon Mrs. Vail's death, the whole of this estate so that the allowances cannot affect any person not interested in the estate. They are the remaindermen and they will get the whole estate divided among them upon Mrs. Vail's death. 476

Mrs. Plumb gets the income during her life from one-half of the estate so that the granting of these allowances will only affect the persons who are applying for them and they will eventually get the property upon Mrs. Vail's death. The accumulated income here amounting to about $800,000., upon Mrs. Vail's death will be divided between Mrs. Plumb and the three grand-children. 477

The trust fund created by the estate of Mr. Houghton will be divided in two upon Mrs. Vail's death and Mrs. Plumb will receive the income from one-half and the balance will be divided equally among the surviving children of Mrs. Harris, so that by granting these allowances the child and grandchildren will be simply getting now what they will eventually get in the end, with the exception of the small annual allowances asked for for the brother and sisters of Mrs. Vail, which they, the only persons interested in the estate are willing these sisters and brother should have.

478 *Plaintiff's Exhibit 14.*

I would like to correct the amount of the allowances to the sisters and brother. The allowance for Mrs. Taft is $3,000. because of her added responsibilities, and the brother and the other sisters $2,000. each.

We rest, your Honor.

Mr. King: On behalf of the General Guardian, I think his duty in the premises is to submit the interest of the children to the court for such disposition as the court may make, and as you will probably observe, it was the purport of the stipulation which was read into the record and acquiesced in, to establish an equality as be-
479 tween the petitioner and the children of Laura Houghton Harris, as evinced by the conduct of Mrs. Vail during her competency.

REFERENCE CLOSED.

No. 2869.

State of New York,
County of New York, ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, DO HEREBY CERTIFY,
480 That I have compared the preceding with the original Testimony before Referee on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Filed. May 23, 1940.

IN WITNESS WHEREOF, I have hereunto set my
(Seal) hand and affixed my official seal, this 23rd day of May, 1940.

ARCHIBALD R. WATSON
County Clerk and Clerk of the Supreme Court,
New York County.

Plaintiff's Exhibit 15.

481

SUPREME COURT

NEW YORK COUNTY

REPORT OF REFEREE.

In the Matter

of the

Application of MABELLE HOUGHTON PLUMB for an allowance to be paid herself and others from the income accruing each year to HELEN HALL VAIL, an incompetent person.

482

TO THE SUPREME COURT OF THE COUNTY OF NEW YORK.

I, PHILIP J. DUNN, to whom the above matter was referred by Order of this Court signed at Special Term, Part I. thereof on the 26th day of November, 1926, to take proof of the facts alleged in the petition herein and to report to the Court with all convenient speed upon the matters referred to me with my opinion, do respectfully report as follows:

483

Before proceeding with the examination and hearing of the matter so referred to me I duly took and subscribed the statutory oath as Referee, and the same is hereto annexed.

The first hearing of this proceeding was duly held before me at my office at No. 165 Broadway, in the Borough of Manhattan, City of New York, on the 15th day of December, 1926, upon due notice to Messrs. Dean, King & Smith, attorneys for Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, and to Messrs. Geller, Rolston & Blanc,

484 *Plaintiff's Exhibit 15.*

attorneys for The Farmers' Loan and Trust Company as Committee of the Property of Helen Hall Vail, the said incompetent.

The following parties appeared at said hearing: your petitioner, by Montgomery, Peabody & Grace, her attorneys; Ieuan Harris, as General Guardian of said infants, by Dean, King & Smith, his attorneys; and The Farmers' Loan and Trust Company as Committee of the Property of Helen Hall Vail by Geller, Rolston & Blanc, its attornys.

485 The testimony taken before me and such exhibits as are not now filed in the office of the Clerk of the County of New York, are annexed to this report.

I find as follows—

That the petitioner is the daughter of Helen Hall Vail by a prior marriage to Charles F. Houghton, deceased.

That said Helen Hall Vail was on the 11th day of August, 1926, duly adjudged by a Sheriff's Jury of New York County to be incompetent to manage herself or her affairs, and that by an Order of the Supreme Court of the County of New York entered on the 12th day of August, 1926, the findings of the said Sheriff's Jury were

486 in all respects, ratified, approved and confirmed, and The Farmers' Loan and Trust Company of New York City was appointed Committee of the property of said Helen Hall Vail, and MaBelle Houghton Plumb was appointed the Committee of the Person of said Helen Hall Vail.

That said Helen Hall Vail is seventy-one (71) years of age and is the owner of the following parcels of real property, upon each of which is erected a private dwelling: one parcel situated at Geneva, New York, which is valued at One Hundred and Forty Thousand Five Hundred and Seventy-seven and 65/100 ($140,577.65) Dollars, including lands, buildings and contents; one parcel situated at Spring Lake, New Jersey, which is valued at

Plaintiff's Exhibit 15.

487

Fifty Thousand Nine Hundred and Fifty-three and 30/100 ($50,953.30) Dollars, including lands, buildings and contents; one parcel at Palm Beach, Florida, which is valued at Four Hundred and Thirty-three Thousand Eight Hundred and Sixty-two and 83/100 Dollars ($433,862.83) including lands, buildings and contents.

That said parcels of real property produce no income and are not encumbered by any mortgages.

That said incompetent also owns jewelry valued at about One Hundred and Seventy-seven Thousand Four Hundred and Eighteen ($177,418.00) Dollars.

488

That said incompetent is a life beneficiary of a Trust created under the Last Will and Testament of Charles F. Houghton, deceased, her first husband, the income of which for the last four years has been as follows:

For the year 1923, ...	$240,209.22
" " " 1924	252,395.27
" " " 1925	308,732.20
" " " 1926 down to the 9th of December, 1926.	651,692.82

That the Farmers' Loan and Trust Company has in its possession as Committee of the property of Helen Hall Vail, accumulated income received from the Estate of 489
Charles F. Houghton, deceased, and belonging to Helen Hall Vail amounting to $812,445.57.

That the incompetent was married to said Charles F. Houghton in 1878; that said Charles F. Houghton died on the 30th of March, 1897, leaving a last Will and testament which was admitted to probate in the Surrogate's Court, for the County of Steuben, in the State of New York, on the 17th day of April, 1897; that in and by said Will the residuary estate of said Charles F. Houghton was bequeathed and devised to The Farmers' Loan and Trust Company as Trustee to hold for the benefit of said

490 *Plaintiff's Exhibit 15.*

Helen Hall Vail during her life with directions to pay the income to her.

That thereafter the said Helen Hall Vail married one Charles D. Vail, who died in the year 1922.

That the said Helen Hall Vail by her first husband had three children, one of whom, Florence Houghton, died in infancy, one of whom, Laura Houghton Harris, died leaving three children, John H. Harris now eleven (11) years of age, William R. Harris, now nine (9) years of age, and David F. Harris, now six (6) years of age,
491 and your petitioner who is the only other and surviving child of said Helen Hall Vail.

That said Helen Hall Vail had no issue by her second marriage.

That the said infant children of Laura Houghton Harris reside with their Father, Ieuan Harris at Geneva, New York and that said Ieuan Harris has heretofore been appointed the General Guardian of said three children, and has duly qualified as such.

That at this hearing the said MaBelle Houghton Plumb at the request of the attorneys for Ieuan Harris as General Guardian of John H. Harris, William R. Harris and
492 David F. Harris, consented and agreed in the event that she survives her Mother, the incompetent, and thereby becomes entitled to a share of her Mother's estate either by the will or intestacy of the said Helen Hall Vail, any such share shall be charged with any allowance which may be awarded to the said MaBelle Houghton Plumb in this proceeding, to the exent if any by which such allowance exceeds in value or in amount the aggregate of any allowance or allowances which may be awarded in this proceeding to the General Guardian of the said infants John H. Harris, William R. Harris and David F. Harris, minors, and further consented and agreed that any order which may be made in this proceeding awarding an al-

Plaintiff's Exhibit 15.

493

lowance to her shall be conditioned in accordance with the above and shall provide that any award thereunder shall be allowed to her only by way of advancement and as such shall be accepted by her, provided that the order granting allowances shall direct, that if the total amount paid to the infants shall exceed the amount paid to her, that the excess paid to the infants shall be considered also as an advancement, and allowed to them as such.

That the last will and testament of said Charles F. Houghton deceased, directs that upon the death of his wife, the said Helen Hall Vail, his residuary estate be divided into two equal parts, one of said parts to be held for the benefit of his daughter, Laura, the income to be paid to her during her life, and upon her death leaving issue the principal of said part or share to be divided between her issue share and share alike. The other of said parts to be held for the benefit of his daughter, MaBelle, the income to be paid to her during her life, and upon her death leaving issue the principal of such part or share to be divided between her issue share and share alike.

494

That said MaBelle Houghton Plumb has one child, Joseph H. Plumb, Jr. who is now thirteen years of age.

That the said Laura Houghton married Ieuan Harris on the 16th day of July, 1914, and died on the 31st day of August, 1925, leaving a Last Will and Testament which was admitted to probate in the Office of the Surrogate's Court for the County of Steuben, in the State of New York, and that in and by said Will she devised and bequeathed all her property to her husband, Ieuan Harris; that her estate was appraised at $50,696.25., and consisted in part of real estate at Geneva, New York, appraised at $30,000.00, and the balance personal property.

495

That said Helen Hall Vail has surviving the following brother and sisters, and no others:

496 *Plaintiff's Exhibit 15.*

Edward Hageman Hall, 68 years of age, residing at 702 West End Avenue, New York City, who has a salary and other income aggregating about $7,000.00 per annum.

Mary Hall Taft, a widow, 79 years of age, residing at 425 Central Avenue, Orange, N. J., who has no income whatsoever and is entirely dependent upon her relatives. Said Mary Hall Taft has one daughter who is fifty years of age and is incapable of supporting herself in any way.

Elizabeth Hall Burdick, a widow, 75 years of age residing at Reed House, 537 East 121st Street, New York
497 City, who has no income whatsoever and is entirely dependent upon her relatives.

Abbey Ferrin, a widow, 66 years of age, residing at 616 Wolfs Lane, Pelham, New York, who has no property, except the house in which she lives, which she has been obliged to mortgage to obtain the necessary funds for her maintenance and support. Said Abbey Ferrin is bedridden and unable to do any work.

Lucy H. Ferris, a widow, 73 years of age, residing at Farrand Avenue, Highland Park, Michigan, who has no income whatsoever and is entirely dependent upon her relatives.

498 That until their marriage, Laura Houghton Harris and MaBelle Houghton Plumb, the daughters of the incompetent, made their home with their mother, who gave to each of them an annual allowance; these contributions were continued after the marriage of her daughters and were increased in amount; to each of them she gave a home of equal value and both before and after the marriage of her daughters, the incompetent manifested a disposition to benefit them by gifts of money and property. In making such benefactions, the incompetent treated her daughters equally and any gift to one was coincident with and characterized by a gift substantially similar in kind, value and amount to the other.

Plaintiff's Exhibit 15.

That prior to the time when the said Helen Hall Vail was declared incompetent she had repeatedly and over a long period of years evinced kindly feelings toward her brother and sisters by contributing various annual sums to their support and maintenance. 499

That all her said sisters have no property and are practically destitute, and it is necessary for their maintenance and support that the allowances which are hereinafter recommended should be granted. That the granting of all the allowances hereinafter recommended would coincide with the undoubted desires and intentions of the incompetent were she competent, as evidenced by the solicitude and generosity toward the several applicants, displayed by her during competency. 500

That the brother of said incompetent, Edward Hageman Hall, is self supporting but is married and his wife is and has been for some years very ill, and the said Hall has been required during the past fifteen years to devote a large portion of his income to paying doctors and hospital bills. He has also contributed largely to the support of his sisters. That the said Hall is now sixty-eight years of age and to maintain the position which his education entitles him to it is necessary that the allowance herein asked for, for his benefit be granted. 501

That said Helen Hall Vail is now at Dr. Macdonald's House, Central Valley, New York, to which institution she was committed by an Order of the Supreme Court dated the 10th day of December, 1926, where she has all the comforts which her position and affluence entitle her to have and are possible under the circumstances, including automobile, etc.

That the cost of maintaining said incompetent at Dr. Macdonald's House, supplying her with clothes and other necessaries for her care and maintenance and for her pleasure will not exceed the sum of $25,000. per annum.

502 *Plaintiff's Exhibit 15.*

That the total cost of maintaining the incompetent and her property, including the payment of taxes, etc. will fall far short of the sum of $50,000 per annum.

That the average annual income of the incompetent for the last four or five years has been about $318,000. and that after deducting the estimated cost of maintaining her and her property, i. e. $50,000. per annum there will remain a balance of income of over $250,000. per annum, a sum far in excess of all conceivable needs of the incompetent.

503 That the disease from which the said Helen Hall Vail is suffering is a progressive disease and the chances of her recovery are very slight, if any, and there is no probability of her being able to take care of herself or property.

That upon the death of said Helen Hall Vail one-half of the principal sum held for her benefit under the Will of said Charles F. Houghton, deceased, will vest in the said John H. Harris, William R. Harris, and David F. Harris, the income of the other one-half will be paid to the petitioner, MaBelle Houghton Plumb, a daughter of said Charles F. Houghton, deceased, during her life and upon her death the principal of said share will be divided among her issue.

504 That a diligent inquiry has been made to find out whether the said Helen Hall Vail has heretofore made a Will, but no Will has been found, and that upon the death intestate of the said Helen Hall Vail the accumulated income in possession of The Farmers' Loan and Trust Company will be divided equally between MaBelle Houghton Plumb, your petitioner, or her issue, and the children of Laura Houghton Harris, John H. Harris, William R. Harris and David F. Harris, then surviving.

No Will of the incompetent having been discovered, the granting of allowances herein can interfere with no testamentary plan of the incompetent, and the inference is

Plaintiff's Exhibit 15.

505

clear from the past generosity displayed by the incompetent toward all the applicants herein, that the granting of allowances to them would accord with the intentions and the desires of the incompetent were she now competent to make them herself.

None of the parties to this proceeding has made any objections to the granting of allowances herein. The Committee of the Property of the incompetent has filed a cross-petition asking for instructions in regard to the relief prayed for in the petition by which this proceeding was instituted, and the petitioner, having stipulated that any order granting an allowance either to her or to the infant children of her sister, Laura Houghton Harris, shall be conditioned, as hereinbefore set forth, their General Guardian has submitted the interests of his wards to the protection of the Court.

506

After considering all the facts and circumstances, the advanced years of the incompetent and the incurable nature of her disease, and the fact that the annual income of the incompetent is vastly in excess of the amount required to maintain her in comfort and luxury, I recommend that there be granted annually to Mabelle Houghton Plumb an allowance of $50,000.; to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris the sum of $50,000., to be applied by him toward their maintenance and support; to Edward Hageman Hall an allowance of $2,000.; to Mary Hall Taft an allowance of $3,000.; to Elizabeth Hall Burdick an allowance of $2,000.; to Abbey Ferrin an allowance of $2,000., and to Lucy Hall Ferris an allowance of $2,000. The Committee should be instructed accordingly.

507

Dated, January 12th, 1927.

Respectfully submitted,

PHILIP J. DUNN.

508 **Plaintiff's Exhibit 16.**

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 14th day of January, 1927.

Present: Honorable Richard P. Lydon, Justice

509 In the Matter

of

the application of MaBelle Houghton Plumb for an allowance to be paid herself and others from the income accruing each year to Helen Hall Vail, an incompetent person.

On reading and filing the petition herein of MaBelle Houghton Plumb, applying for an allowance each year out of the income of Helen Hall Vail an incompetent per-
510 son, for herself and others, and the cross-petition of The Farmers' Loan and Trust Company, as Committee of the Property of Helen Hall Vail an incompetent, asking for the instruction of this Court as to relief prayed for in said petition, and upon the Order of Reference herein, entered in the Office of the Clerk of the County of New York on the 26th day of November, 1926, wherein and whereby the matter was referred to Philip J. Dunn, Esquire, of the City of New York, as sole referee, to take proof of the facts alleged in the petition and to report to the Court, with all convenient speed upon the matters referred to him by the order, with his opinion, and the

Plaintiff's Exhibit 16.

said petitioner MaBelle Houghton Plumb, by Messrs. Montgomery, Peabody & Grace, her attorneys, having duly moved for the confirmation of the said Referee's Report, and the other parties hereto having duly waived further notice of said motion, and said The Farmers' Loan and Trust Company as Committee as aforesaid, having duly appeared upon such motion by Messrs. Geller, Rolston & Blanc, its attorneys, and having submitted the interests of the incompetent to the protection of the Court, and Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, having duly apeared upon said motion by Messrs. Dean, King & Smith their attorneys, and having submitted the interests of his wards to the protection of the Court, and due deliberation having been had thereon, and

On reading and filing the affidavit of Philip J. Dunn, Esquire, the Referee, the affidavit of John S. Montgomery, Esquire, a member of the firm of Montgomery, Peabody & Grace, the attorneys for the petitioner, MaBelle Houghton Plumb, the affidavit of Frederic P. King, Esquire, a member of the firm of Dean, King & Smith, the attorneys for Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, and the affidavit of Charles Angulo, Esquire, a member of the firm of Geller, Rolston & Blanc, the attorneys for the Farmers' Loan and Trust Company as Committee of the Property of Helen Hall Vail, an incompetent, with respect to the services rendered by each of them in this proceeding, and

On reading and filing the testimony taken at said hearing and the report of the said Referee, and it appearing to my satisfaction that the income of the said incompetent for the last four or five years has averaged over

514 *Plaintiff's Exhibit 16.*

Three Hundred Thousand Dollars, and that to maintain and support the incompetent, and to care for her property, there cannot reasonably be expended a greater sum than Fifty Thousand Dollars, and that the said Helen Hall Vail has not made a last will and testament and that the said MaBelle Houghton Plumb, the only surviving child of said incompetent, or her issue, and the said John H. Harris, William R. Harris and David F. Harris, the three children of a deceased daughter of said incompetent, or their issue, will be, upon the death of said incompetent,
515 the only heirs-at-law and next-of-kin of said incompetent, and the only persons entitled to share in her estate, and this Court having found and hereby finding, upon the evidence submitted before said Referee and to this Court, that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property.

NOW ON MOTION of MONTGOMERY, PEABODY & GRACE attorneys for said petitioner, and no one appearing in
516 opposition thereto, it is

ORDERED that the report of said Referee be and the same is hereby in all respects confirmed, it is

FURTHER ORDERED that The Farmers' Loan and Trust Company as Committee of the Property of Helen Hall Vail an incompetent person, pay out of the income of the said incompetent, each year in equal quarterly payments the following sums to the following named persons

To MABELLE HOUGHTON PLUMB, the petitioner, the daughter of said incompetent, the sum of Fifty Thousand ($50,000.) Dollars,

Plaintiff's Exhibit 16.

517

To IEUAN HARRIS, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of Fifty Thousand ($50,000.) Dollars,

To EDWARD HAGEMAN HALL, the brother of the incompetent, the sum of Two Thousand Dollars,

To MARY HALL TAFT, a sister of the incompetent, the sum of Three Thousand Dollars,

To ELIZABETH HALL BURDICK, a sister of the incompetent, the sum of Two Thousand Dollars, 518

To ABBE FERRIN, a sister of the incompetent, the sum of Two Thousand Dollars,

To LUCY HALL FERRIS, a sister of the incompetent, the sum of Two Thousand Dollars, and it is

FURTHER ORDERED that the said The Farmers' Loan and Trust Company as Committee of the Property of the incompetent, pay out of the income in its hands the following sums

519

To PHILIP J. DUNN, ESQUIRE, the Referee, the sum of Three Thousand and Five Hundred Dollars, as and for the allowance to which he is entitled, for his services herein

To MONTGOMERY, PEABODY & GRACE, as attorneys for MaBelle Houghton Plumb, the petitioner, the sum of Five Thousand Dollars, as and for the allowance to which they are entitled, for their services herein, together with the sum of Two hundred and seventy-eight 90/100—to cover their disbursements herein

520 *Plaintiff's Exhibit 16.*

To Dean, King & Smith, as attorneys for Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of One Thousand and Five Hundred Dollars, as and for the allowance to which they are entitled, for their services herein

To Geller, Rolston & Blanc, as attorneys for The Farmers' Loan and Trust Company, as Committee of the Property of Helen Hall Vail the incompetent, the sum
521 of One Thousand Dollars, as and for the allowance to which they are entitled, for their services herein, and it is

Further ordered that if upon the death of Helen Hall Vail, the incompetent, it shall appear that the total allowances received by MaBelle Houghton Plumb, and the total aggregate allowances received by the said three grandchildren, John H. Harris, William R. Harris, and David F. Harris, or their guardian, Ieuan Harris, for their account, shall not be equal to each other, that the excess received by either MaBelle Houghton Plumb, or the said three grandchildren, or their guardian, shall be
522 considered as an advancement, and it is

Further ordered that the application of the said Committee for instructions be and the same is hereby granted and that said Committee be and is hereby instructed to make the payments hereinbefore specified as the Committee of the said incompetent's property.

Enter

R. P. L.
J. S. C.

Plaintiff's Exhibit 17. 523

NEW YORK SUPREME COURT

New York County

In the Matter

of the

Application of MaBelle Houghton Plumb for an allowance to be paid to herself and others from the unexpended surplus income now in the possession of the City Bank Farmers Trust Company, as Committee of the Property of 524

Helen Hall Vail,

an incompetent person.

To the Supreme Court of the State of New York:

Your petitioner, MaBelle Houghton Plumb, respectfully shows:

1. That she is forty-nine years of age and a daughter of Helen Hall Vail, and resides at Geneva, in the State of New York. 525

2. That said Helen Hall Vail was, on the 11th day of August, 1926, duly adjudged to be incompetent to manage herself and her affairs, by a Sheriff's Jury of New York County, duly called to inquire into said matter, and that by an Order of the Supreme Court of New York County, entered on the 12th day of August, 1926, the findings of the said Sheriff's Jury were in all respects ratified, approved and confirmed, and your petitioner was appointed the Committee of the Person of said Helen Hall Vail,

526 *Plaintiff's Exhibit 17.*

and The Farmers' Loan and Trust Company, now the City Bank Farmers Trust Company, a New York corporation, was appointed the Committee of her property. That both the Committee of the Person and the Committee of the Property of said Helen Hall Vail have duly qualified and are now acting as such. That, as your petitioner is informed and verily believes, the said Helen Hall Vail is suffering from cerebral arterio-sclerosis, with dementia, hallucinations and senile arteriselerotic chorea, and that her condition holds out no hope for recovery.

527 3. That said Helen Hall Vail is eighty years of age and is a widow.

4. That said Helen Hall Vail was married in 1878 to Charles F. Houghton, who died on the 30th day of March, 1896. That in the year 1902 the said Helen Hall Vail was married to Charles Vail who died in the year 1922. That the said Helen Hall Vail has had three children, all by her first marriage, one of whom, Florence Houghton, died without issue; one of whom, Laura Houghton Harris, died leaving three children, John H. Harris, now sixteen years of age, William R. Harris, now fifteen
528 years of age, and David F. Harris now twelve years of age; and your petitioner, who is the only other and surviving child of said Helen Hall Vail. That the said infant children of said Laura Houghton Harris, deceased, reside with their Father, Ieuan Harris, at Salisbury, Connecticut, and that Ieuan Harris has heretofore been appointed the General Guardian of the said three children and has duly qualified as such.

5. That in and by his Last Will and Testament the said Charles F. Houghton, deceased, the Father of your Petitioner and of said Laura Houghton Harris, deceased, gave, devised and bequeathed his residuary estate in

Plaintiff's Exhibit 17.

529

rust, and directed the Trustee thereof to apply the rents, ncome and profits thereof to the use of said Helen Hall Vail during her life, and upon her death to divide the same into two equal parts, and to apply the income of one of said parts to the use of his daughter, the said Laura Houghton Harris, deceased, during her life, and he income of the other of said parts to the use of your petitioner, during her life; with a further provision, that upon the death of either of said daughters leaving issue her surviving, the part so held in trust for her should rest in her issue, share and share alike.

530

6. That your petitioner has one child, Joseph H. Plumb, Junior, who is now nineteen years of age.

7. That the said Laura Houghton Harris died on the 31st day of August, 1925, and that prior to said date the said Helen Hall Vail had been in the habit of contributing out of the income received by her from said Trust created for her benefit by the said Charles F. Houghton, deceased, he Father of your petitioner, various annual sums for he support and maintenance of her two daughters, the said Laura Houghton Harris, and your petitioner.

531

8. On information and belief that said City Bank Farmers Trust Company as Committee of Helen Hall Vail upon its appointment as Committee on the 12th day of August, 1926, entered into possession of all the property of the incompetent and has collected the income and profits of the said property since that date.

9. On information and belief that said City Bank Farmers Trust Company as such Committee filed its last annual Inventory and Account as of the 31st day of December, 1931, showing in its possession principal of

532 *Plaintiff's Exhibit 17.*

$956,805.78 invested as therein set forth and accumulated income of $1,051,078.55, also invested as therein set forth.

10. On information and belief that the said $1,051,078.55 of income represents the total amount of accumulated surplus income since the date of the appointment of the Committee.

11. On information and belief that the income of the incompetent comes from two sources—(1) The income
533 from her estate held by the Committee, and (2) the income from the Estate of Charles F. Houghton, deceased, her husband. From both these sources the total annual income received by the incompetent has been as follows—

For the year ending	
December 31st, 1926 (August 12th to December 31st)	$173,269.27
December 31st, 1927	426,639.23
December 31st, 1928	453,585.60
December 31st, 1929	431,730.74
December 31st, 1930	447,202.06
December 31st, 1931	460,183.62

534

12. On information and belief that from the income received by the said Committee for the year 1931 amounting to..... $460,183.62

there was paid, pursuant to an Order of the Supreme Court of the State of New York, dated the 14th of January, 1927..... $109,000.00

there was expended in the maintenance of the incompetent.... 17,716.18

Plaintiff's Exhibit 17.

535

there was expended in the maintenance of the property of the said incompetent a total of...	92,371.20	219 087.38
leaving a balance of unexpended income for the year 1931 of...		$241,096.24

which is included in the aforesaid accumulated income, i. e. the sum of $1,051,078.55.

13. That your petitioner believes, were her Mother competent and mentally normal, she, her Mother, would have distributed from time to time to your petitioner, her 536
daughter, and her grandchildren, a substantial part of the accumulated income.

WHEREFORE your petitioner prays for an Order directing the City Bank Farmers Trust Company as Committee of the Property of said incompetent, to pay out of the unexpended surplus income now in the possession of the Committee to your Petitioner the sum of TWO HUNDRED AND FIFTY THOUSAND THOUSAND ($250,000.00) DOLLARS, and to Ieuan Harris as General Guardian of John H. Harris, William R. Harris, and David F. Harris, infants the sum of TWO HUNDREED AND FIFTY THOUSAND ($250,000.00) DOL- 537
LARS, and that such other and further relief may be granted to your petitioner herein as shall be deemed proper.

Dated, New York, April 26, 1932.

MABELLE HOUGHTON PLUMB
Petitioner

538 *Plaintiff's Exhibit 17.*

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

MABELLE HOUGHTON PLUMB, being duly sworn, says: That she is the petitioner named in the above entitled proceeding; that she has read the foregoing petition and knows the contents thereof, and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, she believes it to be true.

539

MABELLE HOUGHTON PLUMB.

Sworn to before me this
26th day of April, 1932.

THOS. T. GRACE,
Notary Public,
New York County #150.

540

541

Plaintiff's Exhibit 19.

SUPREME COURT

COUNTY OF NEW YORK

ANSWER

In the Matter

of the

542

application of MABELLE HOUGHTON PLUMB for an allowance to be paid to herself and others from the unexpended surplus income now in the possession of City Bank Farmers Trust Company, as Committee of the property of

HELEN HALL VAIL,

an incompetent person.

CITY BANK FARMERS TRUST COMPANY, as Committee of 543
the property of Helen Hall Vail, the incompetent person above named, by its attorneys, Taylor, Blanc, Capron & Marsh, for an answer to the petition herein, alleges on information and belief as follows:

1. Said respondent is a domestic corporation having its principal place of business at No. 22 Williams Street, Borough of Manhattan, City, County and State of New York, and on or about the 12th day of August, 1926 was duly appointed committee of the property of the above named incompetent by this Court, and on or about said

544 *Plaintiff's Exhibit 19.*

date duly qualified and entered into possession of the property of said incompetent and has since continued to act and is now acting as such committee of the property.

2. Said respondent is advised and alleges that it is merely the custodian or bailiff of the property of the incompetent and as such is solely the agent or representative of the Court to administer and manage the same under the supervision and control of the Court, in accordance with its instructions and directions, and accordingly
545 said respondent respectfully suggests that a Special Guardian be appointed herein for the said incompetent, to appear and defend this proceeding in her behalf, and to take any and all steps that may be necessary for the protection of her rights.

3. Said respondent further respectfully suggests that a Referee be appointed herein to take proof and report to this Court with all convenient speed concerning the present condition of the incompetent, including the unlikelihood of her recovery, the present and probable future condition of the incompetent's estate, her present
546 and future financial needs, the present and probable future needs of the petitioner and those for whom a distribution is sought herein, the custom of the incompetent in respect of donations to her children, her probable intent in respect of the distribution sought on this application, the existence or non-existence of a Will, and her presumptive distributees upon her death, and that upon the coming in of such report this Court make such order in the premises, concerning the disposition of the incompetent's property, as to this Court may seem just and proper, and that said respondent be instructed accordingly.

Plaintiff's Exhibit 19.

547

WHEREFORE, said respondent respectfully submits the rights and interests of said incompetent in this proceeding to the protection of the Court.

TAYLOR, BLANC, CAPRON & MARSH,
Attorneys for City Bank Farmers
Trust Company as Committee of
the Property of said incompetent,
Office and Post Office Address:
22 Exchange Place,
New York, N. Y.

548

State of New York,
County of New York, } ss:

W. G. CHISOLM, being duly sworn, deposes and says: That he is a Trust Officer of City Bank Farmers Trust Company, the respondent named in the foregoing Answer; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

549

W. G. CHISOLM

Sworn to before me this
2nd day of May, 1932.

WILFRED H. McCRACKEN
Notary Public, New York County
N. Y. Co. Clk's No. 104
Comm. Exp. Mch. 30, 1934

No. 2861

550 *Plaintiff's Exhibit 19.*

State of New York, }
County of New York, } ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, Do HEREBY CERTIFY, That I have compared the preceding with the original Motion Papers on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

551 Filed. May 5, 1932

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day (Seal) of May, 1940.

ARCHIBALD R. WATSON,
County Clerk and Clerk of the
Supreme Court, New York County.

552

Plaintiff's Exhibit 21.

553

NEW YORK SUPREME COURT

NEW YORK COUNTY

ANSWER OF IEUAN HARRIS GENERAL GUARDIAN

In the Matter

of the

Application of MABELLE HOUGHTON PLUMB for an allowance to be paid to herself and others from the unexpended surplus income now in the possession of City Bank Farmers Trust Company, as Committee of the Property of 554

HELEN HALL VAIL,

an incompetent person.

The respondent, Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, by Dean, King, Smith and Taylor, his attorneys, answering the petition herein, alleges: 555

FIRST: That heretofore and on or about the 11th day of December, 1925, pursuant to a decree duly made and entered in the Surrogate's Court of Ontario County, New York, the said Ieuan Harris was duly constituted and appointed the General Guardian of the persons and property of the said infants; that he has duly qualified as such General Guardian; that letters of General Guardianship have been issued to him as aforesaid and he is now the General Guardian of the said infants.

556 *Plaintiff's Exhibit 21.*

SECOND: That the infant, John H. Harris, is now sixteen years of age; that the infant, William R. Harris, is now fourteen years of age and the infant, David F. Harris, is now twelve years of age, and all of the said infants reside with the respondent, who is their father and General Guardian.

THIRD: That the said infants are strangers to all and singular the matters and things set forth in the petition in this proceeding and claim such rights and interests therein as they may have and to which they may be
557 entitled.

WHEREFORE, the respondent submits the rights and interests of his wards in this proceeding to the protection of the Court.

IEUAN HARRIS,
Respondent and General Guardian of
John H. Harris, William R. Harris
and David F. Harris, infants.

DEAN, KING, SMITH & TAYLOR,
558 Attorneys for General Guardian,
Office and Post Office Address,
160 Broadway,
Borough of Manhattan,
New York, N. Y.

Plaintiff's Exhibit 23.

559

At a Special Term, Part I. of the Supreme Court, held in and for the County Of New York at the County Court House in the Borough of Manhattan, City, County and State of New York, on the 4th day of May, 1932.

Present: Honorable Phoenix Ingraham, Justice.

Order

560

In the Matter

of the

application of MaBelle Houghton Plumb for an allowance to be paid to herself and others from the unexpended surplus income now in possession of City Bank Farmers Trust Company, as Committee of the property of

Helen Hall Vail,

an incompetent person.

561

MaBelle Houghton Plumb, having heretofore on due notice of motion presented her petition dated and duly verified the 26th day of April, 1932, praying for an order directing City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail, an incompetent, to pay out of the unexpended surplus income now in the possession of the Committee to the petitioner MaBelle Houghton Plumb, the sum of $250,000, and to Ienan Harris, as general guardian of John H. Harris William R. Harris and David F. Harris, infant parties, the sum of

562 *Plaintiff's Exhibit 23.*

$250,000. and for such other and further relief as may be just as from the said petition more fully appears, and said motion having duly come on to be heard.

NOW, on reading and filing the notice of motion dated April 26th, 1932, and the said petition of MaBelle Houghton Plumb, verified April 26th, 1932, with due proof of service of the said papers upon Taylor, Blanc, Capron & Marsh, on behalf of City Bank Farmers Trust Company of New York, as Committee of the property of the said
563 incompetent, and upon the notice of appearance of Taylor, Blanc, Capron & Marsh, attorneys for the Committee of the property of said incompetent, and the answer of City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail, verified the 2nd day of May, 1932, and upon the notice of appearance, of Dean, King, Smith & Taylor, attorneys for Ienan Harris, as general guardian of John H. Harris, William R. Harris and David F. Harris, and upon reading and filing the affidavit of Theodore W. Neumann, M.D., duly sworn to the 3rd day of May, 1932, and it appearing to the satisfaction of the Court from said affidavit that the said Helen Hall Vail
564 is an incompetent person and that service of the papers in this proceeding upon said incompetent personally might result in injuring the health and mental condition of said Helen Hall Vail and that the Court in its discretion should dispense with the delivery of a copy of said papers to said incompetent in person, and upon filing the opinion of the Court,

NOW, on motion of Montgomery, Peabody & Grace, attorneys for the petitioner, it is

Ordered that Cornelius J. Smyth, Esq., of 1 East 43rd St. of the Borough of Manhattan, City of New York, be

Plaintiff's Exhibit 23.

565

and he hereby is appointed special guardian for and on behalf of the said Helen Hall Vail, an incompetent, to appear and defend this proceeding on behalf of said Helen Hall Vail and protect the rights of the said incompetent, on filing the usual affidavit and consent, and is hereby designated to receive service of all papers herein on behalf of said incompetent, and it is further

ORDERED, ADJUDGED AND DECREED that upon the service and filing of the answer of said special guardian as aforesaid on behalf of said incompetent person, that the proceeding and application be and the same hereby are referred to Townsend Morgan, Esq., of the Borough of Manhattan, 50 B'way, City of New York, to hear and take testimony of the respective parties, act and take proof upon all questions arising in connection therewith and report, to this Court with his opinion with all convenient speed; and it is further

566

ORDERED, ADJUDGED AND DECREED that delivery of a copy of the papers in this proceeding and of all other papers in this proceeding to said Helen Hall Vail in person be, and the same hereby is, dispensed with.

567

Enter,

P. I.
J. S. C.

568 *Plaintiff's Exhibit 23.*

No. 2882

State of New York
County of New York } ss.:

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County,

Do hereby certify, That I have compared the preceding with the original order on file in my office, and that the same is a correct transcript therefrom, and of the whole
569 of such original.

Filed, May 5, 1932

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

(Seal) Archibald R. Watson
County Clerk and Clerk of the Supreme Court, New York County.

570

Plaintiff's Exhibit 26.

SUPREME COURT

NEW YORK COUNTY

In the Matter of the Application

of

MABELLE HOUGHTON PLUMB for an allowance to be paid to herself and others from the unexpended surplus income now in the possession of City Bank-Farmers Trust Company as Committee of the property of HELEN HALL VAIL, an incompetent person.

No. 50 Broadway, New York City,
May 13, 1932, 10 o'clock A. M.

Before: TOWNSEND MORGAN, Esq., Referee.

APPEARANCES:

MESSRS. MONTGOMERY, PEABODY & GRACE,
Attorneys for the Petitioner, by
MR. MONTGOMERY, of counsel.

MESSRS. TAYLOR, BLANC, CAPRON & MARSH,
Attorneys for the Committee, City Bank-Farmers
Trust Company, by MESSRS. CHARLES ANGULO
and THOMAS K. EGAN, of counsel.

CORNELIUS J. SMYTH, Esq.,
Special Guardian for the Incompetent,
Helen H. Vail.

MESSRS. DEAN, KING, SMITH & TAYLOR,
Attorneys for Ienan Harris, General Guardian,
by FREDERICK P. KING, Esq., of counsel.

574 *Plaintiff's Exhibit 26.*

(Met pursuant to notice.)

(The Referee states he has taken and filed the oath of office.)

(It is stipulated by and between counsel for the parties hereto, the Special Guardian not objecting, that the statutory fee for the Referee be waived, and that the same be fixed by the Court.)

(It is stipulated by and between all parties hereto that Edward J. O'Connell, Certified Shorthand Reporter, of
575 150 Nassau Street, New York City, be employed to stenographically report the hearings herein, and that he furnish an original copy of the transcript for filing purposes, and carbon copies to all counsel, and that he shall be paid at the rate of 75 cents per page for the ribbon copy, and 25 cents per page for each carbon copy furnished to counsel.)

Mr. Montgomery: Mr. Referee, this is an application for an allowance of $250,000 from the estate of Helen Hall Vail, an incompetent, to her daughter Mrs. Plumb, and also for an allowance of $250,000 from the estate to Mr. Harris, who is general guardian of the three
576 grandchildren of Mrs. Vail, their mother having died some years ago. Mrs. Vail was adjudged incompetent to handle her own affairs, and was committed to the MacDonald's House, at Central Valley, New York.

Dr. Theodore W. Neumann, a witness, being first duly sworn, testified as follows:

By the Referee:

Q. State your full name. A. Dr. Theodore W. Neumann.

Plaintiff's Exhibit 26.

577

Q. Where do you live? A. Central Valley, New York.

Direct Examination by Mr. Montgomery:

Q. What is your occupation, Doctor? A. Physician.

Q. Are you a qualified examiner in lunacy? A. Yes, sir.

Q. Do you know Mrs. Helen Hall Vail? A. I do.

Q. The incompetent in this proceeding? A. I do.

Q. Is she an inmate of Dr. MacDonald's House at Central Valley, New York? A. Yes, sir.

578

Q. When was she admitted to that institution? A. She was admitted first for observation on September 16th, 1926. She was committed, legally committed, to us on December 10th, 1926.

Q. Have you had charge of Mrs. Vail ever since she has been at Dr. MacDonald's House? A. Yes, sir.

Q. How often have you seen her during that period? A. Every day that I am at the institution, which is almost every day. I see her at least once, sometimes three or four times.

Q. Will you please state what, in your opinion, is the nature of her malady? A. Mrs. Vail is suffering from a form of mental disease which is known medically as

579

psychosis or dementia with cerebral arterio sclerosis. This is characterized by confusion and delusions. She further is suffering with a physical condition which is known as chorea, which is a convulsive state.

Q. Has her physical condition improved since she has been at the hospital? A. No, sir.

Q. Has her mental condition improved? A. No, sir.

Q. Is there more outward evidence of her physical condition today than there was at the time she was committed at the institution? A. Yes, sir; almost constantly she displays these convulsive movements of her whole body,

580 *Plaintiff's Exhibit 26.*

the muscles of her whole body, or muscles of an arm, head, or leg. This is very much more marked. It interferes with her walking. It interferes with her speech. Her speech at times is very difficult to understand. It does not interfere with her eating, as yet. When she is sleeping these convulsive movements disappear.

Q. Is there, in your opinion, any hope of her recovery? A. No, sir.

Q. Doctor, is that a disease that comes on suddenly, or is it one that comes on gradually? A. As a general rule;
581 for a condition based on cerebral arterio sclerosis, is to come on insidiously over a period of years, but so gradually that even those who are closest to the patient fail to recognize it until it becomes of such proportions as to usually cause the patient to be committed and taken care of.

Q. Do you know whether Mrs. Vail made a will or not, Doctor? A. I do not know, no, sir.

Q. Have you ever seen one at the MacDonald House, at all? A. I have not, sir.

Mr. Montgomery: I think that is all, Mr. Refe-
582 ree, unless there is cross examination.

Mr. Angulo: I suggest that the special guardian, if he wants to, should first examine.

Cross Examination by Mr. Smyth:

Q. How long has the patient been in your charge? A. Going on six years.

Q. How many days a week do you see her? A. Well, I should say I see her six days a week on an average.

Q. And have you visited her that way ever since she has been at Dr. Macdonald's House? A. Yes, sir.

Q. Has she any lucid and rational intervals? A. No.

Plaintiff's Exhibit 26.

583

sir, her mental state now is one of general confusion. She has no insight into her mental condition, nor does she appreciate her surroundings as they actually are.

Q. Is she capable at all of judging of her estate and her means? A. I should say not, sir.

Q. You say she could not at any time pass on her estate and decide questions about investment of money, or how it should be invested, or anything like that? A. No, sir, for the simple reason that her whole mental condition is controlled by other thoughts, her delusion thoughts, her hallucinations, that coupled with her confusion. For 584
instance, her condition is changeable one day or for a portion of a day she may be entirely contented with her surroundings. At all times she feels that she is more or less proprietress of the institution, or that portion in which she lives. She feels that she is very much younger than she actually is. She—occasionally feels, that within probably a short time some young man is coming to marry her, to take her away. Her thoughts are concerned with other things than her estate.

Q. How old is she, in your opinion? A. Our records show that she will be 77 in August, 1932.

Q. Do her relatives visit her? A. Yes.

Q. Do you know those relatives? A. Yes, sir. 585

Q. Do you know her daughter, Mrs. Plumb? A. Yes, sir.

Q. Does she recognize her daughter, for instance, when she calls? A. Yes, yes, but there are times that she refuses to see her daughter. She refuses to see the doctors occasionally on the ground that she has too much other important business, and things like that, to occupy her mind.

Q. Is her condition curable? A. This is a progressive condition. It is not curable. It tends to become progressively, worse.

586 *Plaintiff's Exhibit 26.*

Q. The condition will get worse, in your opinion? A. It has during the past five years, and I think the situation is such that it will continue to get worse.

Q. You feel no hope of her recovery at all? A. My general experience with cases of this kind, it leads me to believe there is no hope for her.

Q. Has she ever tried to escape from up there? A. Yes, sir.

Q. Is this an organic trouble that affects the mind? A. Yes, sir, it is an organic condition. It is a condition
587 of the arteries of the brain which cause softness of certain portions of the brain so as to show on her physical side the lack of connection between the fine movements also changes in her thought and mentality. It shows a deterioration and replacement of ordinary normal thoughts by ones that are delusional and unreal thoughts.

Q. What kind of quarters does she occupy up there? A. It is a suite.

Q. What does the suite consist of? A. She has a bedroom, sitting room, bath, and another room which is a sun room—The rooms are all connected on the same floor, but in one there is more sun. That is the reason
588 that the extra room was taken.

Q. Where is this Dr. MacDonald's House, that sanitarium? A. At Central Valley.

Q. How large a place is that; what kind of a place is it? A. It is a licensed institution that is licensed under the State of New York Commission of Mental Hygiene. It occupies 250 acres. It has several buildings, large buildings. While it is only licensed to take forty patients, under ordinary standards you can accommodate anywhere from 100 to 150 patients, but most of the patients require suites and cottages, and take a number of rooms.

Q. Has she a nurse? A. She has two day nurses, and

Plaintiff's Exhibit 26.

589

one night nurse. She requires constant attention because of her physical condition.

Q. For how long a period has she had two day nurses and one night nurse? A. Since she was admitted.

Q. Are there any other doctors in attendance besides you, Doctor? A. Three; Dr. Charles W. Pilgrim, Dr. T. D. MacDonald, Dr. John H. Richards.

Q. Did she ever go out of her rooms? A. Yes, she goes out daily, in fair weather, generally motoring.

Q. That is to say, she takes a trip out in the country around Central Valley in an automobile, every day? A. 590
Yes, sir, every fair day.

Q. For her comfort and convenience is there anything else that could be done for her? A. I would say no. She lives a very comfortable life, an old lady in her dotage, very much as she would in her own home. She has her own furniture, everything she cares to have, anything she cares to express a wish for is always forthcoming.

Q. There is nothing denied her that money could buy? A. Absolutely nothing denied her. We have been constantly told by relatives that if at any time there is anything, no matter what it is, that she expresses a desire 591
for, she should have it. We have always followed that rule. It is a standing order.

By the Referee:

Q. Was that suggestion made by Mrs. Plumb? A. Yes.

Q. You mentioned some other doctors there. Do you know whether they share the same opinion of the incompetent as you do? A. Yes, sir.

Q. And it is the same as expressed by you? A. I am expressing the composite opinion of the staff.

592 *Plaintiff's Exhibit 26.*

Q. Have you ever been present when Mrs. Plumb called on the incompetent? A. Yes, sir.

Q. Did you observe anything as to their relations? A. Yes, sir; there were times when the mother is in a mood when she greets her amiably—I won't say effusively—but greets her kindly. There are other times when she treats her rather badly. Other times when she refuses to see her. Other times when she has come we thought it was not best for the mother because she was already in an excited state, and it would not do the mother any
593 good.

Q. Having in mind those various meetings you have described, would you say that the relationship between mother and daughter was kindly? A. I would say so, yes, sir.

By Mr. Smyth:

Q. Who pays the bill which you render? A. Well, now, that is part of an organization I have very little to do with. I take care of the medical problems. I think they are paid by a trust company, but that is a point that I could not tell you, to be perfectly honest. I do not know
594 anything about the financial arrangements.

Q. Has anybody ever tried to put any limit on what was spent for her? A. Absolutely not.

Q. Has there ever been any recommendations of yours for the expenditure of money for her comfort or convenience, or for her physical or mental well-being that were denied? A. Absolutely not, sir.

Q. Do you know of any denial made on any recommendations of these other doctors who have been up there? A. Nothing, sir.

Q. In other words, she has always had every comfort and convenience and every luxury, and every medical at-

595

tention that you think could possibly be necessary for her? A. To be perfectly honest, sometimes things which we recommend be sent her are exceeded in quantity and in quality.

Q. Do you feel, as far as taking care of this woman, this incompetent, that everything is being done that money could do to make her lot as easy as possible? A. I do, sir.

Q. Have outside alienists ever been called in to examine her? A. Yes, sir.

Q. Have you consulted with those? A. Yes, sir. Dr. 596
Riley and Dr. Cornwall.

Q. Did they make any suggestions? A. Nothing, sir.

Q. What opinion did they have of her condition? A. Their opinion was substantially the same as ours at the time they were called in.

Q. And are they specialists in mental diseases? A. They are specialists in mental diseases, one I know is connected with the Neurological Institute, Medical Centre, and I think the other one is too. I am quite sure he is.

Mr. Smyth: That is all.

Cross Examination by Mr. King: 597

Q. As I understand it, this disease from which Mrs. Vail suffers is a disease of old age? A. Yes, sir.

Q. As age increases it never becomes any better? A. Worse, sir.

Q. And her condition as it is at the present time is likely to be accentuated as time goes on? A. Yes, sir, it has been for over a period of five years.

Q. Have you observed Mrs. Vail's condition with respect to the nurses? A. Yes.

Q. The same variability characterize those conditions

598 *Plaintiff's Exhibit 26.*

with the doctors and nurses as with Mrs. Plumb? A. Yes.

Q. So in her relationship with them she was pleasant with them? A. Yes.

Q. And other times she refuses to see them? A. Yes, at other times she refuses to see them. We have to switch around to pay her a visit, and one of the other doctors would have to go in and make the visit.

Q. Does she seem to have power of concentration in her daily life? A. No, sir.

599 Q. Does she read? A. Not as much now as she did. At present she would prefer look at magazines that have pictures.

Q. Does she undertake correspondence? A. No, she has not written since she came to us.

By Mr. Smyth:

Q. Would you allow her to write? A. She has a desk, and she has paper and pencil.

Q. It is within the rules of the House that she could write a letter if she wanted to and send it out? A. Absolutely, sir; anything she wants.

600

By Mr. Angulo:

Q. Doctor, is there any record in medical history of a case like this where there was a recovery? A. To my knowledge there is no such case of recovery.

Q. Is there any possibility of improvement? A. There might be a temporary improvement. There is a possibility, but the probability is very remote.

Q. And is there any possibility of such temporary improvement that might lead to a lucid interval? A. Very remote. Possibly. Her condition has advanced so far.

Plaintiff's Exhibit 26.

Mr. Angulo: All right. That is all.

The Referee: Is that all, Mr. Special Guardian?
Mr. Smyth: Yes.

THEO W. NEUMANN MD.

Subscribed and sworn to before me
this 17 day of May, 1932.

DOROTHY JONES
Notary Public.
Kings Co. Clerk's No. 194 Reg. No. 3141.
N. Y. Co. Clerk's No. 295 Reg. No. 31-197.
Commission expires March 30, 1933.

WARREN L. MURRAY, called as a witness, being first duly sworn, testified as follows:

By the Referee:

Q. State your full name. A. Warren L. Murray.
Q. Where do you live? A. 7201 Ridge Boulevard, Brooklyn, New York.

Direct Examination by Mr. Montgomery:

Q. Mr. Murray, will you please state what your occupation is? A. Trust clerk in the administration department, City Bank & Farmers Trust Company.
Q. How long have you been with the City Bank-Farmers Trust Company? A. Three years.
Q. Do you know when the City Bank-Farmers Trust Company was appointed Committee of the property of Helen Hall Vail? A. Yes, sir, on August 12th, 1926.

604 *Plaintiff's Exhibit 26.*

Q. At that time was the name of City Bank-Farmers Trust Company? A. Farmers Loan & Trust Company.

Q. And it is still the Committee of the property of the incompetent? A. Yes, sir.

Q. Can you state the amount of property which came into the possession of the Trust Company upon its appointment? A. Yes, sir.

Mr. Smyth: I think there ought to be offered in evidence the order appointing—

605 Mr. Montgomery: I took it those were all in evidence in the other proceeding for an allowance. I thought they are all on file and we can offer copies if you want them. We have not the originals here.

The Referee: I think it would be well to say they are on file, and that you offer the copies, and there is no objection.

Mr. Angulo: Couldn't we stipulate all papers and testimony taken in the former proceeding, and all papers filed in connection with the proceedings in the estate of this incompetent be deemed in

606 evidence?

The Referee: If it is agreeable to you.

Mr. Montgomery: It is agreeable to us.

Mr. King: I would like to have that. I intended to offer the records in the other proceeding.

Mr. Angulo: I can file them here.

(Discussion off the record.)

It is hereby stipulated that all the papers on file in the Supreme Court, New York County, in connection with the former proceeding entitled "In the Matter of the Application of MaBelle Houghton Plumb for Allowance to be Paid to Herself and others from the Income Accruing each year, Helen

Plaintiff's Exhibit 26.

607

Hall Vail, incompetent person", and all the testimony taken in said proceeding, as well as all of the papers and proceedings had upon the original application adjudging the said Helen Hall Vail incompetent and to appoint a Committee of her property, to be treated as being in evidence in this present proceeding with the same effect as if offered herein.

Mr. King: I take it that includes also exhibits which were part of the testimony.

Mr. Angulo: It says all papers.

608

The Referee: Is that satisfactory to everybody, including the special guardian?

Mr. Smyth: Are the accounts in as exhibits in that other proceeding?

Mr. Montgomery: No, I think not. They have been succeeded by that proceeding. Here are all the accounts. They are all on file, and that stipulation might also apply to the annual inventories and accounts that have been filed by the Committee of the incompetent.

Mr. Smyth: I would like to have them in the record.

609

The Referee: As I understand it, those applications that were made were granted?

Mr. Montgomery: Yes, sir.

The Referee: And not in conflict in any respect with the application that is now made here?

Mr. Montgomery: No, sir. Is that satisfactory, Mr. Smyth?

Mr. Smyth: So that now there is in evidence these annual accounts of the Committee of the property?

Mr. Montgomery: Yes.

610 *Plaintiff's Exhibit 26.*

Mr. Smyth: They are since the time when the Committee was appointed, the original Committee?

Mr. Montgomery: Yes. We are going to put in the actual figures.

Mr. Smyth: As the pertinent figures?

Mr. Montgomery: Yes.

Mr. Smyth: All right.

(The reporter reads as follows: "Q. Can you state the amount of property which came into the possession of the Trust Company upon its appoint-
611 ment? A. Yes, sir.")

The Witness (Continuing former answer): $1,025,095.61.

Q. That belonged to the incompetent? A. Yes, sir.

Q. What is the amount of principal that the Committee now has in its possession? A. $954,599.08.

Q. Will you explain the difference between the amount that the company received on the date of its appointment, and the amount you now have on hand as capital or principal? A. There were some assets sold from time to time at prices, some of which were lower and some
612 higher than the inventory values. This left in our possession, on December 31st, 1931, capital inventoried at $954,599.08.

Q. Will you please state the source of income received by the Committee for the account of the incompetent? A. The Committee of property receives from the trust fund created under the will of Charles F. Houghton, the incompetent's first husband, certain income, and the Committee receives income from the property received on its appointment which belonged to the incompetent, and also income from the surplus income which has been invested from time to time since our appointment.

Q. Will you please state the amount of income received

613

from these sources for the year 1926? A. During the year 1926, from the date of our appointment, we received $153,269.27.

Q. Will you please state what payments were made out of that income during that year? A. From the date of the appointment of the Committee to the 31st of December, 1926, the Committee expended income as follows: For the personal maintenance of the incompetent $12,696.72; for the maintenance of other property—

Q. That is real property, is it not? A. I was just going to say, for the maintenance of other property, including real estate, $15,491.82. Commissions of the Committee 614
of the property to December 31st, 1926, $2,094.40. Income tax $24,269.96. Items of payments of accrued income on the purchase of securities and miscellaneous expenses, including attorney's fees, $3,860.31, making a total of $58,413.21

Q. What was the balance of the surplus income for the year 1926? A. $94,856.06.

Q. Will you please state the amount of income received by the Committee during the year 1927? A. $426,639.28.

Q. Will you please state the expenditures for that year? A. $278,615.55, composed of items as follows: Payments made pursuant to a court order— 615

Q. Can you give the date of that order? A. January 14th, 1927. $83,116.67.

Mr. Smyth: What was that for?

The Witness: These payments were—

Mr. Montgomery: Would you mind asking that after he gets these things through?

Mr. Smyth: All right.

A. (Continued) Payments for personal maintenance of the incompetent $16,712.23. Maintenance of real property

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$23,149.25. Income taxes $136,474.34. Commissions to the Committee of the property $5,554.01. Payments for accrued interest on the purchase of securities and other miscellaneous expenses $13,609.05. Total $278,615.55

Q. Will you please state the balance of the surplus income received that remained in the hands of the Committee that year? A. $148,023.73.

Q. Will you please state the amount of income received by the Committee during the year 1928? A. $453,588.60.

Q. Will you please state the payments made out of the
617 income for that year? A. $269,683.40 in items as follows: Payments made pursuant to the court order January 14th, 1927, $136,250. Personal maintenance of the incompetent $15,621.72. Maintenance, real property, $25,064.02. Income taxes $75,936.83. Payments for accrued interest on purchase of securities and other miscellaneous expenses $9,987.20. Commissions to the Committee of the property $6,823.63. Total of $269,683.40.

Q. What was the surplus of the 1928 income left in your hands at the end of the year? A. $183,902.20.

Q. Will you please state the amount of income received by the Committee during the year 1929? A. $431,749.49.

618 Q. Will you please state the payments made during that year? A. $259,829.86 made up as follows: Payments pursuant to the court order of January 14th, 1927, $109,000. Personal maintenance of the incompetent $20,162.97. Maintenance of real property $36,302.48. Income taxes $85,023.62. Payments for accrued interest for the purchase of securities and miscellaneous expenses $2,179.03. Commissions to the Committee of the property $7,161.76, making a total of $259,829.86.

Q. Will you please state the surplus income for the year 1929 remaining in the hands of the Committee at the end of that year? A. $171,919.63.

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Q. Will you please state the amount of income received by the Committee during the year 1930? A. $447,202.06.

Q. Will you please state the payments made out of the income for that year? A. $235,921.36 made up as follows: Payments, pursuant to the court order of January 14th, 1927, $109,000. Personal maintenance of the incompetent $17,073.41. Maintenance of real property $27,112.79. Income taxes $67,635.27. Payments for accrued interest on the purchase of securities, miscellaneous expense, $8,220.52. Commissions to the Committee of the property $6,879.37. Making a total of $235,921.36.

620

Q. Will you please state what was the balance of surplus income for that year remaining in your hands at the end of the year? A. $211,280.70.

Q. Will you please state the amount of income received by the Committee during the year 1931? A. $460,183.62.

Q. Will you please state the payments made during that year out of income? A. $219,087.38 in items as follows: Payments made pursuant to the court order of January 14th, 1927, $109,000. Personal maintenance of the incompetent $17,716.18. Maintenance of real property $21,111.31. Income taxes $65,603.05. Payments for accrued interest in the purchase of securities and miscellaneous expenses $5,656.84. Making a total of $219,087.38.

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Q. Will you please state the amount of surplus income for that year remaining in the hands of the Committee the end of the year? A. $241,096.24.

Q. Will you please state the total amount of the surplus income now in the possession of the Committee which had accumulated during the years 1926, 1927, 1928, 1929, 1930 and 1931? A. $1,051,078.56.

Q. Is the surplus income which accumulated during those years invested? A. Yes, sir, with the exception of a small cash balance.

622 *Plaintiff's Exhibit 26.*

Cross Examination by Mr. Smyth:

Q. Mr. Murray, you say there is $954,000 in the capital account as of December 31st, 1931? A. Yes, sir.

Q. That $954,000, is that a book value? A. It is the inventory value, yes, sir.

Q. It is the inventory value. I suppose you don't know the inventory value of the 1st of this month? A. You mean the present value?

Q. What the inventory value is as of the 1st of May,
623 you don't know such a figure? A. Not on the principal, no, sir. I have an approximation of income.

Q. Well, now, this $954,000, that represents the figure at which you took over the securities? A. This amount represents the present balance of principal remaining in our hands on December 31st, 1931, after certain changes in principal had been made as the result of sale of securities, some payments necessarily chargeable against the principal.

Q. Well, could you say roughly what proportion of that $954,000 represents changes? A. I don't think I quite understand your question, Mr. Smyth.

624 Q. Is the great bulk of this $954,000, is that in the same securities which were taken over by the City Bank-Farmers Trust Company in 1926? A. No, it is not in the same securities. Changes were made from time to time. I think there are a few of the original securities now remaining on hand. There have been several changes from time to time.

Q. Will you say there are only a few of the original securities? A. It would be a little bit difficult to say exactly. I would have to refer to the annual inventories and accounts to show the changes.

Q. Let me put it this way: This $954,000, that does not represent market value today or as of December 31st,

Plaintiff's Exhibit 26.

1931? A. No, sir; it represents inventory value in this case. 625

By the Referee:

Q. Do you know what the market value of these securities are? A. Not of the principal, sir, offhand.

By Mr. Smyth:

Q. Can you ascertain for us that market value? A. Yes.
Q. I mean it is mostly quotations that you can readily obtain? A. Yes. 626

By the Referee:

Q. Are there any mortgages in that? A. Yes, sir, there is.
Q. Do you know the proportion of mortgages?

Mr. King: Do the annual accounts from year to year reflect the inventories of the current year?
The Witness: Yes.
Mr. King: Those have been offered in evidence, as I understand it, have they not? 627
Mr. Angulo: They appear to be in evidence.
Mr. King: So the comparison of the inventory of these annual accounts would reflect such changes have been made, and would also reflect the composition at the time the Farmers Loan & Trust Company received it?
The Witness: Correct.
Mr. King: And at the present time?
The Witness: Yes, sir.
The Referee: Will you answer my question?

628 *Plaintiff's Exhibit 26.*

The Witness: I am afraid I would have to add these up on an adding machine.

The Referee: Roughly speaking?

The Witness: I should say mortgages would make up perhaps one-fifth of the principal.

The Referee: Mortgages on New York City real estate?

The Witness: Yes, sir.

The Referee: Are they guaranteed mortgages?

The Witness: I couldn't say. I can determine
629 that for you, if you like.

Mr. Peabody: Are you sure it is one-fifth? Aren't you wrong in that proportion? The principal was largely invested in mortgages. Are any of those mortgages in defaults?

The Witness: No, sir.

The Referee: Go ahead, Mr. Smyth.

By Mr. Smyth:

Q. Well, can you get up a statement then of the market value of this estate as of the present date? A. Yes.

Q. And you understand that you carry on an arrive
630 at this figure of $954,000 from money securities that were bought before the depression? A. That is right.

Q. What I want to get at is what the approximate real value of the estate is at the present time. A. As at the present time?

Q. Now, these mortgages, I take it, are all legal for trustees of that type under the New York law? A. Yes, sir.

Q. And you have no defaults on any of the mortgages? A. Not up to the present time.

Q. Any defaults on bonds? A. I know of none, sir. I am pretty sure that all of the bonds are paying their interest.

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Q. What is the income to the incompetent, approximately, on this $954,000 principal? A. I really couldn't say, Mr. Smyth. It is a difficult question to answer.

Q. You do not start your income from the estate of the incompetent and take one figure as income from these accumulated surplus, and one figure from the capital account which is now $954,000? A. No, sir. That all would have to be figured out to determine what the principal is.

Q. What is the income from the principal and accumulated surplus at the present time, as of December 31st, 1931?

632

Mr. Montgomery: Do you think it is necessary to get that? That would take quite a long while. They would have to calculate all income from the particular securities. Now, that $1,150,000 is all accumulated income. $954,000 represents what they received at the time they were appointed, so could this $2,000,000.

Mr. Smyth: Hasn't he got there what was the income on that approximately $2,000,000 for the year 1931?

Mr. Montgomery: He has given you all that. He has testified what the total income was. He 633
did not testify separately, because that would mean—

Mr. Angulo: He has the figure that Mr. Smyth wants, if I may interrupt. He can give you that figure.

The Witness: $460,183.02.

Q. That is not the total? A. Do you want the figure income received other than that from the Houghton tate?

Mr. Smyth: That is right.

634 *Plaintiff's Exhibit 26.*

Mr. Montgomery: He can give you that.
The Witness: For 1931, $77,412.78.

Q. Who is the trustee of the Houghton estate? A. City Bank-Farmers Trust Company.

Q. Your own company? A. Yes.

Q. Now, then, the income from the Houghton estate was then for 1931 the difference between $77,000 and the $461,000? A. That is right. I will give you the exact figure.

Q. All right. A. It is $382,770.84.

635 Q. Now, has the income from the Houghton estate diminished at all in 1931 as against 1930? A. It shows an increase, sir.

Q. It shows an increase? A. Yes, sir.

Q. Of how much? A. 1930 income was $378,016.09.

Q. Is the Houghton estate invested in all legal investments for trustees? A. No, sir.

Q. Is the principal source of that income from a stock? A. Yes, sir.

Q. Has that rate of dividend been increased or has it been stationary? A. There has been a decrease in a recent cut in dividends, since April 1st of this year.

636 Q. Could you tell me what the old dividend was, and what the present dividend is? A. Up to April, the dividend of the common stock of the Corning Glass was 62-½ cents; the dividend paid in May was paid at the rate of 56-¼ cents per share.

Q. That is roughly a 10 per cent cut in the dividend? A. A little bit less; just slightly less.

Q. So that that would only affect the income if this dividend was continued to the extent of about $38,000, the income from the Houghton estate? A. No, it would not be as much as that.

Q. Because there are other investments in the estate besides the stock, is that what you mean? A. The actual

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decrease in the amount of the income from this common stock would be $22,680 at the new dividend rate.

Q. So that if you take the income as $382,000 for 1931, which is the figure you gave me, with the cut in the dividend if it was in operation all year, the diminution in income would only bring the income down to around $360,000? A. That is right.

Q. Could you tell me what proportion of the Houghton estate is in legal investments, and how much is in common stock? A. I don't think I can from memory, Mr. Smyth.

638

Mr. Angulo: I might say, the difficulty would be in determining the value of the Corning Glass stock. It is only carried at an inventory value, at a very small sum. We could give you a list of the securities.

Mr. Smyth: What I would like to get is what income would come in from the Houghton estate in case a dividend was passed entirely on this common stock.

Mr. Angulo: We can supply that, of course. I know it would be comparatively a small sum. The bulk of the estate, of course, is the Corning Glass, but we will furnish that.

639

Mr. Smyth: I was trying to get at what assured income there was.

Mr. Angulo: Could we give it to you this way: I think Mr. Murray has the figures of the dividends received from the Corning Glass Works for the year 1931.

Mr. Smyth: Is that the only stock in the estate?

Mr. Angulo: Yes.

Mr. Smyth: Then, that would be all right if you could give me that.

Mr. King: Could he give it for a period of years, since the appointment of the Committee?

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The Witness: I could not do that, Mr. Angulo. I would prefer to prepare a statement showing the income.

Mr. Angulo: You have it for 1931, though?

The Witness: The income on the common stock, Corning Glass Works, during 1931 was at the rate of 62-½ cents per share on 30,240 shares. This approximated $226,800.

Mr. Smyth: So that the dividends—

Mr. Angulo: And then, on the preferred?

641 The Witness: On the preferred stock, the dividend was at the rate of 1-¼ per cent each quarter, which amounted to $22,680 quarterly, or $90,720 for the year. That dividend remains unchanged.

Q. Do I understand it to be correct that approximately $316,000 out of the $382,000 received from the Houghton estate is the proceeds of dividends from stock? A. That is right.

Q. And that leaves a balance of approximately $60,000 or a little more income other than that received from the stock in the Corning Glass? A. Yes, sir.

642 Q. Now, then, that $60,000, is that income derived from investments legal for trustees? A. Yes, sir.

Q. In New York State? A. Yes, sir.

Q. And you are quite sure that all that balance then, besides the stock comes from investments that are legal for trustees? A. I am pretty sure that the other investments, outside of Corning Glass Works, are legal. I won't be sure. I would have to consult the record. I do not happen to handle the Houghton estate, and I would prefer to consult the record.

Q. Would you testify that substantially all that balance comes from legal investments? A. I am of the opinion.

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I have not looked at the securities for some time now in the Houghton estate.

Q. What is this real estate in your disbursements each year as a maintenance charge? Take the year 1927. I think that is the first year, what was spent for real estate?

Mr. Montgomary: He has already testified to that.

Mr. Smyth: Yes, I know. I just want to get a figure. A. $23,149.25.

644 Q. And is it approximately that figure each year? A. It is approximately that, with the exception of one year, we had some additional expense.

Q. What is that $23,000 spent for? You say real estate. How is it spent, and what is it spent for? A. For the maintenance of the homestead which is in Geneva New York, and an estate at Palm Beach.

Q. Does the Committee maintain a home for the incompetent in Geneva, New York? A. We keep up the property at Geneva, New York.

Q. What is that property, Mrs. Vail's home? A. That is right.

645 Q. Who lives there, anybody? A. They have a staff up there to take care of the property, a caretaker and assistants.

Q. Is it a large place? A. I believe it is. I have never seen the property.

Q. It is not rented out; there is no income? A. No, not that I know of.

The Referee: It is where the Houghton family came from, is it not, at Geneva, New York?

The Witness: I believe it is, yes, sir.

Q. Is this property a home, a winter home down in Palm Beach? A. That is right.

646 *Plaintiff's Exhibit 26.*

Q. Does anybody occupy that? A. There are caretakers.

Q. It is not rented out? You get no income? A. No, sir.

Q. Even before the depression?

Mr. King: You have not rented it?
The Witness: Not at the present time.
Mr. King: One year you did?
The Witness: Not at the present time.

647 Q. It is proper that you have tried to rent it and have rented it in the past? A. That is right.

Q. And you are trying to rent that, then at the present time—well, I mean during the season you tried to rent it? A. That I could not say offhand, Mr. Smyth.

Mr. King: I think I can answer that. I have had correspondence with the trust company. They are trying to sell it, and they have been constantly trying to rent it.

Q. And you are trying to dispose of that property in
648 Palm Beach? A. Yes, sir, we are. We have made several attempts to do that.

Q. You have no policy at all of holding on to that property? A. No, we do not intend to hold on to that.

Q. That is the Palm Beach property? A. That is right.

Q. How much does that cost a year, approximately? A. I couldn't say, but I should think the greater part of the real estate expense went for the support of the property down there.

Mr. Angulo: Mr. Smyth can look at the account if that will give him the answer.

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Q. Can you look at the account and tell me how much you spent for the maintenance of the Palm Beach piece, and how much approximately for the Geneva? A. I couldn't tell that, because there are so many items paid out during the year for the maintenance of both pieces of property, that it would all have to be segregated in order for me to reach a figure showing the charge for the benefit of the Florida property

Q. Is the Trust Company trying at all to dispose of the Geneva property? A. No, we are not trying to dispose of that property.

650

Q. And you think the greater portion of this expenditure is on the Palm Beach property? A. Yes, sir, that is right.

Q. Would you say roughly how much? A. I prefer not to say from memory, Mr. Smyth. I will be very glad to get the figures for you if you desire.

Mr. Montgomery: You do not want him to get that, do you, Mr. Smyth? I mean it is spent, and I do not see that it makes much difference whether spent on the Geneva property or the Palm Beach property.

651

Mr. Peabody: I think these inventories are on the record, and we can supply you with copies of them, and from that there are payments day by day, and it can be taken off from that, and he can do it from these annual inventories which shows the amount.

Mr. Smyth: I do not think that is necessary. I mean the figure is there, what is spent for the maintenance of this real property, from which there is no income, and that is practically a fixed charge against the incompetent's estate each year, from which there is very little hope of ever getting any

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652 income to offset it, unless there is rental some day at Palm Beach.

Mr. Peabody: They have had an offer to sell it, and I think they are negotiating with a man down there who has made an offer which is a little low, and they are hoping to get him up. I think they may be able to get rid of that Palm Beach property. Within the last month or so there has been an offer.

653 Q. As I understand it, no one gets any benefit out of either of those estates? It is just an expense to the incompetent's estate? A. That is right.

Q. I would like very much to know what the market value is of the incompetent's estate for some current date that you yourself would want to pick out. A. I could give you an approximation at the present time on the income securities, but I haven't got it on the principal.

Mr. Peabody: Could not the Trust Company provide that to the special guardian?

Mr. Angulo: Surely, we will supply that.

Mr. Smyth: That is just what I would like to

654 have.

Mr. Angulo: Yes, sir, surely.

Q. You say there is no mortgages in default, and that there are no bonds in default? A. No, but what I was referring to particularly, Mr. Smyth, was the fact that you wanted to know how much the yield on the various securities were, and having in mind that you asked for this statement, I could include that in there, easily.

Q. You have given me the figure of $77,000 from the incompetent's estate? A. That is right. I thought I could give you the figures of the yield of all the securities

that you could have at the same time the statement was made up.

Mr. Montgomery: That $77,000 includes income from invested surplus income.

Mr. Smyth: Yes. Then, I would like to know what the income is from the principal of the estate.

The Witness: Yes, I can show that on this statement.

Mr. Smyth: So it will break it up and show what the income is from the principal of the incompetent's estate, and what the market value is of the principal, and what the market value is of this accumulated surplus, because the figure of $1,051,000 —is that the figure for the— 656

Mr. Montgomery: That is accumulated income.

The Witness: That is right.

Q. That $1,051,000 is another inventory figure? A. That is right.

Q. Such as you use when you make up annual accounts. If you got a security in 1928 you would carry it at the 1928 value if you have not sold it? A. That is right.

Q. And it may be greatly depreciated in market value, but it would not show in your report except in a few instances where you have changed the security? A. That is right. 657

Mr. Angulo: He can give you that figure now.

The Witness: I have an approximation of the valuation of the income securities.

Mr. Peabody: That is accumulated income. He can give you the market value of that.

Q. The market value of the accumulated income which

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is $1,051,000, you can give me the market value of that at the present time? A. That is right.

Q. All right, I would like to know that. A. This value is not absolutely accurate.

Q. You are going to give me an accurate value in the statement? A. That is $907,277.69, making an approximate net difference of $143,800.

The Referee: I understand that is invested in New York City first mortgages and various Municipal and State bonds, is that correct, that $907,000?

659 The Witness: Yes, there may be some other bonds in here outside of Municipal and State bonds, but I don't think there are. You are correct, Mr. Morgan.

Q. You do not know how much is invested of that in mortgages and how much in bonds, do you? A. I haven't got the exact figure on the mortgages. I can run it off here and give you a figure.

Q. Now, you have charge of this estate in the City Bank-Farmers Trust Company? A. Yes, sir.

Q. Have you ever seen this incompetent? A. No, I
660 have not.

Q. You have never been up to MacDonald's House? A. No, sir.

Q. And do you know if anybody from the City Bank-Farmers Trust Company who has gone up there? A. Yes, there have been officers of the bank to see Mrs. Vail. I could not give you the exact date.

Q. When they have seen her, do you mean they have seen her up there in MacDonald's House? A. I believe so; I would not be sure.

Q. Do you know who those officers are? A. No, I can't say that I do offhand, Mr. Smyth.

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Mr. Smyth: Do you know who they are, Mr. Angulo?

Mr. Angulo: Mr. Peabody is the attorney for this estate.

Mr. Peabody: I do not know. I could not say who has been there or when.

(Discussion off the record.)

The Referee: Have you any more questions, Mr. Smyth?

Mr. Smyth: No, I have no more questions.

The Referee: Mr. Murray, you will see to it 662
that those bits of information that the special guardian has asked be furnished to him as quickly as you can.

The Witness: Yes, I will. It will take some little time to prepare the market value and income, inasmuch as there are so many municipalities in the account, that it will take some time to obtain the values on them.

Mr. Smyth: I do not want you to waste too much time on the income. That is in a lump sum that I have here already. I am interested in, of course, what the real market value is of these securities. 663

Mr. Montgomery: You mean the securities in the principal?

Mr. Smyth: Yes.

Mr. Montgomery: But they are not going to dispose of those in this application. Those will still remain in the estate.

Mr. Smyth: That is true, but I want to be sure there is real money in the estate after this money is taken out.

The Referee: Before you let the accumulated income go out.

664 *Plaintiff's Exhibit 26.*

Mr. Smyth: Why, certainly.

Mr. Peabody: I think he is entitled to that, but how far you want to itemize that—

Mr. Smyth: I do not want it in any more detail. I just want to know what the real value is as distinguished from this inventory value. Now, for instance, in the inventory value of the accumulated surplus it is down as $150,000. I want to know if money is taken from that accumulated surplus, is there plenty of principal there.

665 Mr. Montgomery: I think that is reasonable.

Mr. Smyth: Left to take care of this incompetent.

Mr. Montgomery: I think that is reasonable.

The Referee: That would not take such a long time to get, would it, Mr. Murray?

The Witness: No, sir, I have a simple statement here which has not been filled in in its run-off, without values on it. This shows items of income and investments. They are all marked with their yield. Would this statement satisfy you, Mr. Smyth, a statement of this nature? It

666 goes through all securities and shows which is principal and which is income.

Mr. Peabody: My understanding is that Mr. Smyth would be satisfied with a statement similar to the one you have given in regard to the accumulated income.

(Discussion off the record.)

The Referee: That would not take long?

The Witness: No, sir.

The Referee: Will you do that as soon as you can?

The Witness: Yes, sir.

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Cross Examination by Mr. King:

Q. Mr. Murray, I want to ask you one or two questions particularly with regard to the inventory which has been mentioned as $954,000. A. Yes.

Q. For many years the Farmers Loan and Trust Company was the executor and trustee under the will of Charles F. Houghton? A. Yes, sir.

Q. And a life beneficiary of that estate was Mrs. Vail? A. Yes, sir.

Q. At the time of her incompetency there was in your hands as custodian for her or as beneficiary of this will 668
of Charles F. Houghton, this amount of money which has been referred to as $954,000, isn't that right? A. The inventory of that property was a little bit higher than that. I think I have testified to it some time ago.

Q. And do you know what the origin of that $954,000 was, generally? A. That constituted property that was originally taken over by the Committee and treated as principal, and as set forth more particularly in this 1926 annual inventory and account in Schedule A.

Q. Can you tell me whether or not that $954,000 itself represented accumulated income in the hands of Mrs. Vail from the estate of Houghton? A. Part of it did, 669
yes, sir.

Q. When you say part of it, do you mean to a large extent? A. Yes, sir.

Q. And so practically all of that $954,000 was from income? A. Yes, sir.

Q. You have no hesitancy in saying that? A. After examination of Schedule A in the 1926 account, it is quite apparent that is the situation.

By Mr. Smyth:

Q. In this $954,000, is this Palm Beach and Geneva

670 *Plaintiff's Exhibit 26.*

real estate included, or is that in the $1,051,000 figure, the accumulated surplus? A. That property—

Mr. Peabody: I made up these accounts, so I am familiar with it somewhat, and Mr. Murray does not recall the $956,000 is personal property. The real estate is carried as an appraised value and does not appear.

Mr. Smyth: The real estate is not the $954,000 figure at all.

671 Mr. Peabody: That is my understanding.

The Witness: That is right: it is not included.

Q. It is not included in the $954,000 at all? A. Although it is carried on our records at the appraised value.

Mr. Peabody: And it does not appear in the total?

The Witness: No.

Mr. Smyth: Can you state what the two pieces of real estate are carried at?

Mr. Peabody: I can give you that.

672 The Witness: All right, sir, thank you. The appraised value of the property at Geneva, New York, is $45,275. The property at Palm Beach is appraised at $196,274.25.

Mr. Smyth: I have no further questions of this witness, Mr. Referee.

WARREN L. MURRAY

Subscribed and sworn to before me
this 19th day of May, 1932.

TOWNSEND MORGAN
Referee

Plaintiff's Exhibit 26.

MaBelle Houghton Plumb, called as a witness, first being duly sworn, testified as follows: 673

By the Referee:

Q. What is your full name? A. MaBelle Houghton Plumb.

Q. Where do you live, Mrs. Plumb? A. Geneva, New York.

Q. That is your residence? A. Yes. I have not been there very much.

Q. But that is where you pay your taxes from, and that is your official residence? A. Yes. 674

Direct Examination by Mr. Montgomery:

Q. Mrs. Plumb, you are the daughter, are you not, of Mrs. Helen Hall Vail, the incompetent? A. I am.

Q. And how many times was Mrs. Vail married? A. Twice.

Q. Please give us the name of her first husband. A. Charles Frederick Houghton.

Q. How many children did she have by that marriage? A. Three.

Q. Will you please give their names and state whether they are alive or not? A. Laura Houghton, deceased, Florence Houghton, deceased, and myself MaBelle Houghton Plumb 675

Q. Florence Houghton died in infancy, did she not? A. Yes.

Q. And Laura Houghton married? A. She did, yes.

Q. Whom did she marry? A. Ieuan Harris.

Q. And she died about when A. On August 31st, [illegible].

Q. And did she leave any children? A. Three sons.

676 *Plaintiff's Exhibit 26.*

Q. Will you please give their names and their ages, if you can? A. John Houghton Harris, he is sixteen, William Reese Harris, fourteen, and David Farnum Harris, twelve.

Q. Have you any children? A. One son.

Q. What is his name, please? A. Joseph Hudson Plumb, Jr.

Q. How old is he, Mrs. Plumb? A. Nineteen.

Q. Did your mother marry after your father's death? A. She did, yes.

677 Q. Whom did she marry? A. Dr. Charles Delamater Vail.

Q. Is he alive? A. No.

Q. And do you know when he died, Mrs. Plumb? A. He died in the summer of 1923.

Q. Were there any children by that marriage? A. None.

Q. Do you know whether the children, John H. Harris, William R. Harris and David F. Harris have a guardian? A. They have, yes.

Q. Who is he? A. Their father, Ieuan Harris.

Q. And he is still alive? A. Yes.

Q. And is their guardian? A. Yes.

678 Q. Is your son attending school? A. He is in boarding school.

Q. When does he go to college? A. We hope next year.

Q. Will you please state what the relationships were between your mother, your sister and yourself, and her three grandchildren prior to the time she became ill? A. We were always a very affectionate and united family.

Q. Did you live with her at the time of your marriage? A. I did.

Q. And your sister also? A. Yes.

Q. Did your mother make any gift to you or your

Plaintiff's Exhibit 26.

679

sister that you can remember? A. Yes, she did; some rather large sums.

Q. Are you receiving any allowance from the estate of your mother? A. Yes, I am.

Q. Will you please state the amount? A. $50,000 a year.

Q. And is Mr. Harris, as guardian of your sister's children, receiving the same amount? A. Yes, as far as I know.

Q. Have you any resources of your own, Mrs. Plumb, outside of that allowance? A. A small amount that comes from the estate of my father's sister, about $300 a year from that.

680

Q. That is, you get $300 A. Approximately that.

Q. And your sister's children get the other $300? A. Yes.

Q. Your living expenses, due to the age of your son and the fact of his preparation for college, going to college, will be considerably increased, will they not? A. Oh, very much so, yes.

Q. In your opinion, is $50,000 a year that you receive from your mother's estate sufficient to maintain you, yourself and your son in the manner in which your position entitles you to, and also to send him through college and educate him in the manner in which his position entitles him to be educated? A. Not entirely.

681

Q. Mrs. Plumb, have you visited your mother up at Dr. MacDonald's House? A. Yes, very often.

Q. Will you please describe the place, and also the quarters which your mother has there"? A. Well, there are about 200 acres of very beautiful grounds around the buildings. There are a number of buildings all well equipped, nicely furnished, well heated, and there is luxury and comfort there. My mother has three rooms, her sitting room and her bedroom which we have fur-

682 *Plaintiff's Exhibit 26.*

nished for her, and one room which is sunnier than the others in which she sits part of the time. She likes to have the nurses in there. I took that third room for her because she did not like to have the nurses with her constantly.

Q. Does she have the use of an automobile whenever she wants? A. Yes, she has the use of an automobile.

Q. And did you have any meals there? A. Yes. I have luncheon every time I go up to see her.

Q. How are the meals? A. Delicious.

683 Q. Are they just as good as she would have in her own home? A. Yes, I should say so.

Q. Are the quarters which she occupies as roomy and as well furnished as it is possible under the circumstances? A. Yes, decidedly.

Q. In your opinion, is she receiving everything that she could possibly receive under the circumstances, considering the amount of her property and her income? A. I have done everything for her that I could possibly think of and that anybody else can suggest for me to do for her in every way.

Q. The doctor testified that sometimes they made sug-
684 gestions as to what might be brought for her comfort and pleasure? A. Yes.

Q. And have you always followed out those suggestions? A. In every way.

Q. In fact, you have, as he stated, supplied more than he felt was necessary? A. Every time I go to see my mother I have asked both the doctors that I see there if there is anything they thought of since I was last there that would add to her comfort and happiness, and I always accept their suggestion in every way.

Q. And if they make a suggestion you see that that article or thing is supplied? A. Yes, indeed.

Q. Have you had any contact with the nurses which

Plaintiff's Exhibit 26.

your mother has? A. Yes, I have made it my business to talk with them. 685

Q. Are they pleasant and agreeable people? A. Yes, they are. Dr. Pilgrim has splendid nurses up there.

Q. Is that on high ground? A. Yes, very, on the side of a small mountain there.

Q. Is not the whole institution more like a luxurious country club than it is a sanitarium? A. Yes, I should think so. I was very much surprised to find out how nicely they could do things in a place of that kind.

Q. The grounds are kept in beautiful order? A. Like a park they are. Mother sees beautiful flower beds and beautiful lawns and trees from her rooms, a lovely view. 686

Q. There is no place that you know of that you would rather have your mother than that? A. No.

Q. From her appearance is she happy and contented there as much as possible under the circumstances? A. Yes, I should think so. She has been in such a state of mental confusion that it is difficult to tell what her reactions are, but I know she is comfortable.

Q. During the time that your mother was well, and until you noticed that something was happening to her, she was always generous and affectionate and kind to you and your sister when she was alive, and the three grandchildren, the children of your sister, until she became afflicted with this disease? A. Very much so. 687

By the Referee:

Q. During the time that your mother was in good health, did she ever make you any substantial gifts of money? A. Yes, she did, Mr. Morgan.

Q. You consider a substantial gift, I assume around $20,000 or $25,000? A. She gave me at one time $30,000 to buy a house, and another time a check for $10,000 when I started for Australia.

688 *Plaintiff's Exhibit 26.*

Q. And she always evidenced a very kindly feeling for you, an affectionate feeling? A. Yes, indeed she did.

Q. Would you say it was a great affection? A. Yes, I would.

Q. And when she was normal, an affectionate feeling toward your son? A. Yes, she was devoted to my son.

By Mr. Montgomery:

Q. And also to the three other grandchildren? A. Very
689 proud of her grandsons. I never saw a prouder grandmother.

Q. Those gifts that you speak of, are not the only gifts that your mother gave you? A. No.

Cross Examination by Mr. King:

Q. Mrs. Plumb, may I ask how old you are? A. Forty-nine years old.

Q. Mrs. Plumb, how long have you been married? A. Twenty years this June.

Q. Previous to your marriage, you lived at home with your mother? A. I did.

690 Q. And up until that time your sister Laura was alive? A. She was, yes.

Q. You and your mother and your sister Laura lived together, isn't that so? A. Yes.

Q. And your family life at that time was characterized by a good deal of luxuries, was it not? A. Yes, very much so.

Q. First you lived at Corning, New York, is that true? A. Yes, I was born there.

Q. Then you went to live at Geneva? A. Yes.

Q. Do you recall that date, roughly? A. I was born in 1883. I was 17 years old when I went there to live.

Plaintiff's Exhibit 26.

691

Q. At that time you went to boarding school? A. Yes.

Q. And that was one of the more fashionable boarding schools at New York City? A. Supposed to be.

Q. Your sister went there too, isn't that true? A. Yes, sir.

The Referee: What was the name of that school?

Mr. King: Mrs. Hazen's School. It is out of business now.

The Referee: Was it Mrs. Hazen's School?

The Witness: Yes, but it is no longer in existence.

692

Q. During that period of time your mother gave you every advantage, social and educational, did she not? A. Yes, she did.

Q. Did your life at that time include travelling abroad? A. Yes.

Q. Did it include a trip around the world? A. Yes.

Q. And that occupied nearly a year, isn't that so? A. About a year and a half.

Q. That trip was characterized by a great deal of luxury? A. Yes, everything possible was done to make it comfortable and pleasant.

693

Q. Your mother paid entirely for that trip, did she not? A. Yes.

Q. Did that include a visit to Egypt? A. Yes.

Q. To China? A. Yes.

Q. To Japan? A. Yes.

Q. All the various countries which she thought was of interest? A. Yes.

Q. Your sister accompanied you on that trip? A. Yes.

Q. So there were three in the party? A. Four.

Q. All those expenses were borne by your mother? A. Yes.

694 *Plaintiff's Exhibit 26.*

Q. Was she liberal in making allowances to you and your sister? A. Yes.

Q. Was there an equality in the way in which she treated you two sisters? A. Yes, decidedly so.

Q. What she would do for one she would do for the other? A. Yes.

Q. Did she ever make presents of expensive jewelry? A. Yes, many of them.

Q. I think you referred to the fact that she gave you a house which was of the value of $30,000, is that cor-
695 rect? A. Yes.

Q. Did she make a corresponding gift to your sister? A. She did; she gave her some property in Geneva.

Q. Your home in Geneva was spacious? A. Yes.

Q. It required a number of servants to keep it up? A. Yes.

Q. Generally speaking, you say the surroundings in which you were brought up were luxurious? A. I think they were.

Q. Previous to the time you were married she was making you an allowance of $5,000 a year? A. Yes.

Q. Am I correct in remembering your previous testi-
696 mony to the effect that that was increased to $6,000 a year? A. Yes, she raised it the last two years to $6,000.

Q. Did she make the same increase in the case of your sister? A. Yes.

Q. So that each of you received $6,000 a year? A. Yes.

Q. Was that first motivated by your marriage? A. No.

Q. Was it motivated at all by the fact of your sister's marriage? A. No.

Q. So up until the time of Mrs. Vail's incompetency, why, you each had an allowance of $6,000 a year? A. Yes.

Q. That was irrespective of any other resources which either of you had, is that so? A. Yes.

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Q. Did you know as a matter of family knowledge whether or not your mother had any resources independently of what accrued to her from your father by your father's death? A. I know of none.

Q. So all of the family substance was derived from your father, is that so? A. Yes.

Q. Your mother had no independent means of her own? A. No.

Q. Since your mother's adjudication of incompetency you have made a thorough search for a will, have you not? A. I have, yes.

698

Q. You have inquired among the lawyers who you knew your mother employed whether or not they had ever drawn a will for her? A. I have never been able to find any.

Q. There was never any response to those inquiries? A. No. Anybody we asked said they knew nothing about any will that mother had ever made.

Q. Do you know whether or not your mother's last lawyer who represented her in various matters concerning your father's estate was Chief Justice Hughes? A. Yes, he was.

Q. I believe you testified on the last hearing that an inquiry had been made of Judge Hughes and of his son as to whether or not either of them had ever drawn a will? A. I believe that to be so, but I did not make that inquiry myself.

699

Q. In any event, no will was ever forthcoming, to your knowledge? A. No.

By the Referee:

Q. And do you know what your mother's income was at the time she was making your sister and yourself an

700 *Plaintiff's Exhibit 26.*

allowance of $6,000 a year? A. No, Mr. Morgan, I do not know.

Q. But you do know as a matter of general knowledge that the income has materially increased since that time? A. I do know that, yes.

Q. That is, the income from this fund? A. Yes.

By Mr. Smyth:

Q. Who is the attorneys that you inquired about as to whether your mother had ever made a will besides
701 Mr. Justice Hughes? A. Well, we inquired at the Trust Company.

Q. To the City Bank-Farmers Trust Company? A. Yes.

Q. And did they deny— A. They knew nothing of it.

Q. They knew nothing of it? A. They knew nothing of it.

Q. They never heard of a will? A. No.

Q. Did you ask them if a will was ever filed with them? A. I did, yes.

Q. Your mother lived in Geneva? A. Yes.

Q. Did she have an attorney there? A. Yes, there were two attorneys there.

702 Q. What were their names, do you remember? A. Mr. L. G. Hoskin, and a Mr. O'Brien, and we asked both of them and they knew nothing about it.

Q. You say "we", you mean you personally? A. Yes.

Q. And they never heard of a will? A. They never heard of a will.

Q. Had they said your mother had never discussed with them the drawing of a will? A. No, I do not think anything was ever said about that.

Mr. King: W. Smith O'Brien is the name of that gentleman?

The Witness: W. Smith O'Brien. Thank you.

Plaintiff's Exhibit 26.

703

Q. And both those attorneys in Geneva said they knew nothing of the will? A. Both attorneys in Geneva said they knew nothing of the will.

Q. And in New York were there other attorneys who represented your mother besides Mr. Hughes? A. Mr. Hughes and his son who did some work for mother at some time.

Q. I mean was he the only attorney? A. So far as I know. She did not always discuss her affairs with me.

Q. But they were the only attorneys that you knew of and you asked them? A. Yes.

704

Q. And they said they knew of no will? A. Yes, they said they knew of no will.

Q. How often do you go up to Dr. MacDonald's house? A. Well, my visits up there vary. Last year I was in the hospital very ill, and I didn't get up there for three or four months. I tried, in the beginning, to get up there regularly every six weeks, but Dr. Pilgrim said that it upsets my mother to have me come in,—any visitors distressed her, and he said he thought it better if I did not come quite so often. He said it would make it easier for them and easier for everybody, but I have always access to her any time of day or night. Now, I

705

try to go up about every seven or eight weeks, and I receive a written report weekly from the doctors.

Q. You stated that you have eaten there yourself? A. Yes, every time I go there I have a delicious luncheon.

Q. And the food is really high class? A. Yes, I should think so.

Q. And you are the one who is consulted about the number of nurses? I mean they are employed under your direction? A. Well, Dr. Pilgrim and I together, consult each other, and I like to know what he thinks is right for my mother.

Q. He consults you before a nurse would be hired?

706 *Plaintiff's Exhibit 26.*

A. Oh, no. He would consult me as to whether my mother should have one or two or three nurses, but he occasionally changes the nurses, without anything being said to me.

Q. I do not mean anything about the changes. And your mother has three nurses, two day and one night? A. Yes.

Q. You know that of your own knowledge? A. Yes, I see them every time I am there.

Q. And you see them actually in attendance? A. Oh,
707 yes. They are always there when I go there. I had an understanding with Dr. Pilgrim that my mother was never to be left alone.

Q. They do not take care of any other patients besides your mother? A. No, absolutely not. They devote their entire time to her.

Q. How many doctors are there up there? A. Well, Dr. Pilgrim is the senior doctor and Dr. Neumann who was here today is his son-in-law, and Dr. MacDonald, those three have been there since my mother was taken there, and there is a new doctor whom I have not met, who came in the last two or three months.

708 Q. Isn't Dr. McDonald dead?" A. The founder of this institution is dead, and this Dr. MacDonald is no relation. It is just a coincidence that his name is the same.

Q. Do you know whether these doctors are specialists in mental diseases? A. Yes.

Q. And did you ever make any inquiry as to their standing and ability? A. Well, yes, when my mother was committed we made an exhaustive research up there. We did everything we could to find out whether it was a suitable place for her to be placed there.

Q. Did you ever have any outside alienist or doctors go to examine your mother? A. Yes. Before she was

Plaintiff's Exhibit 26.

committed she was looked over by ten alienists, altogether. 709

Q. I suppose all prominent in the profession? A. Yes; they brought in a unanimous verdict about her.

Q. Do you know from talking to the nurses and the doctors up there and to your mother that she gets the best of care? I mean, have you ever inquired as to that? A. Oh, yes, I make inquiries in every way, and I draw the nurses off aside every time I go up there and question them closely. I have the utmost confidence in Dr. Pilgrim; he has a very, very fine record; he is a very splendid man. 710

Q. When you say you lived at Geneva, did you live at this house that your mother owns? A. Yes, I have been up there for some time as guardian of her person, to look after her things up there. I go up and stay there for quite a length of time, from time to time. All those nice things up there have to be taken care of. We have a servant up there who has been with my mother 45 years, and he is the caretaker there, and has other men to help him. I go up to look the house over for moths, and have it aired and stay for some time.

By the Referee. 711

Q. Where do you live when you do not live at Geneva? A. We have a small home at Marion, Massachusetts. We went down there so the boy could be there in the summer. He is quite a sailor, and we wanted to be near the water.

Q. Have you an apartment here in New York? A. No.

(Short recess taken.)

712 *Plaintiff's Exhibit 26.*

By Mr. King:

Q. Mrs. Plumb, how old were you when your father died? A. 12 years old.

Q. Were the relations between your father and mother entirely normal and affectionate? A. Yes, indeed.

Q. Was you mother devoted to your father? A. Yes.

Q. Did she ever express herself with a desire to carry out his wishes with regard to her daughters? A. Yes, I know she always tried to do that.

713 Q. And do you recall any specific conversations on the subject? A. Well, I don't think I do, no, except I know I heard her say a great many times she wanted to be mother and father both to her girls, and she tried to carry out my father's wishes in every way.

Q. She was, of course, familiar with the terms of your father's will? A. Oh, yes.

Q. At the time that will was made, how old was your sister? A. When the will was made?

Q. At the time of your father's death? A. My sister was 16 at the time of my father's death——

Q. At the time both of you were minors? A. Yes.

714 Mr. Smyth: Is the will in evidence?

Mr. Montgomery: Yes.

Mr. King: I intended to offer it in evidence.

Mr. Smyth: Just what I want to find out is whether it is among the papers we stipulated should be in evidence.

Mr. Montgomery: It is in evidence in the former proceeding.

The Referee: Why don't you, in order to be sure of the thing—we have not the will physically present, why not offer it in evidence now, and if

Plaintiff's Exhibit 26.

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there is no objection, it is received. Is that satisfactory?

Mr. King: I will, if Mrs. Plumb's testimony is concluded.

The Referee: I do not know about that. Mr. Smyth, have you anything further?

Mr. Smyth: No.

The Referee: Mr. Angulo?

Mr. Angulo: No questions.

By the Referee:

716

Q. How old were you, if you can recall, when your father died? A. My father died in March, on March 29th, and I was 13 years old that April.

Q. And your sister was older than you? A. My sister was 4 years older than I. Her birthday was in May.

Q. Your father was always most affectionate to both your sister and you? A. Yes, indeed.

The Referee: Do you want to offer the will now?

Mr. King: Yes. I will offer in evidence a copy of the will of Charles F. Houghton, and codicil thereto. The will is dated December 20th, 1892, and the codicil is dated March 20th, 1893. 717

The Referee: Any objection?

Mr. Smyth: I have no objection.

Mr. King: I believe it is in the record on the former proceeding that this will was probated, and the Farmers Loan & Trust Company has ever since acted as executor and trustee thereunder.

(Will and codicil received in evidence and marked General Guardian Exhibit 1, of this date.)

718 *Plaintiff's Exhibit 26.*

MaBelle Houghton Plumb

Subscribed and sworn to before me
this 16th day of May, 1932.

Eugene O'Dunne Jr
Notary Public
My commission expires December 29, 1938

Notarial certificate

719 Seal

Ieuan Harris, called as a witness, being first duly sworn, testified as follows:

By the Referee:

Q. What is your full name? A. Ieuan Harris.
Q. Where do you live, Mr. Harris? A. Salisbury, Connecticut.

Direct Examination by Mr. King:

720

Q. Mr. Harris, until her death, were you the husband of Laura Houghton Harris? A. Yes.
Q. Was she a daughter of the incompetent, Helen H. Vail? A. Yes.
Q. Do you remember the date of death of Laura Houghton Harris? A. August 31, 1925.
Q. And thereafter, were you appointed general guardian for your children? A. Yes.
Q. I believe that you testified to that, did you not, in the former proceeding? A. Yes.
Q. At the—

Plaintiff's Exhibit 26.

721

Mr. King: At that time, your Honor, there was offered in evidence an exemplification of the record of Mr. Harris's appointment as general guardian. I would like to supplement that by offering in evidence the certificate of the Surrogate's Court of Ontario County, dated the 6th day of May, 1932, as to the fact that Mr. Harris is still acting as general guardian.

The Referee: Any objection?

Mr. Smyth: No objection.

722

(Received in evidence and marked General Guardian's Exhibit 2, of this date.)

Q. Will you tell me the name of your three children, and their ages? A. John Houghton, 16; William Reese, 14; David Farnum, 12.

Q. Until your wife's death, did you live at Geneva, New York? A. Yes.

Q. Did Mrs. Vail also live there? A. Yes.

Q. Did she know these children? A. Yes.

Q. What was her attitude with regard to them? A. Very proud of them.

Q. Did she visit them constantly? A. Very much. 723

Q. What was the relation between Mrs. Vail and your wife, Laura Houghton Harris? A. Mother and daughter.

Q. Everything was entirely agreeable? A. Yes, sir.

Q. Was she familiar with your way of living? A. Who, Mrs. Vail?

Q. Yes? A. Yes.

Q. Was your married life characterized with a good deal of luxury? A. Yes, I should think so.

Q. You have traveled abroad? A. Yes.

Q. And conduct quite a large house? A. Yes.

Q. With quite a number of servants? A. Yes.

724 *Plaintiff's Exhibit 26.*

Q. And with all those circumstances Mrs. Vail was familiar? A. Yes.

Q. You were never dependent upon her at any time for support or financial aid? A. No.

Q. Notwithstanding those circumstances did she make an allowance to her daughter? A. Yes.

Q. And do you recall what that was? A. $6000 a year.

Q. Was that continuous during your married life? A. I think it was $5,000 at one time, and increased to $6,000 the last comparatively few years.

725 Q. In addition to those sums do you know whether or not Mrs. Vail made presents to your wife? A. Yes, she gave us the house or gave my wife the house.

Q. Do you recall the approximate value of that? A. I think the assessed valuation is $27,000, at the moment. A good many gifts in the shape of jewelry, and on occasions like birthdays or Christmas, something of that kind, high holidays, as it were, a good sized gift.

The Referee: Of money?

The Witness: Yes, or a piece of jewelry.

726 Q. In giving you this house, do you know whether that was to equalize a corresponding gift to her daughter Marbelle? A. Well, I don't know; she may have had it in mind. I should think yes, having done the same to both.

Q. And do you know whether or not those two gifts were made approximately at the same time? A. I do not think I could answer that.

Mr. Montgomery: I think that has been testified to by Mrs. Plumb.

Mr. King: You think it is in the former record?

Mr. Montgomery: It has been testified to today by Mrs. Plumb.

Plaintiff's Exhibit 26.

727

Q. Do you remember the date of the gift?

Mrs. Plumb: It was just about 15 years ago; that is all I can remember.

Q. Mr. Harris, do your children live with you at the present time? A. Yes.

Q. And do they go to school? A. Yes.

Q. And you pay their expenses, do you not? A. Yes.

Q. You receive as their guardian an allowance which is made by the Court in a former proceeding in this matter? A. Yes.

728

Q. And anything which is required by way of their support and education is paid by you? A. Yes.

Q. And are all their moneys invested in legal securities? A. All of that is invested in that way.

Mr. King: That is all.

The Referee: Any questions, Mr. Smyth?

Mr. Smyth: No.

The Referee: Any questions, Mr. Angulo?

Mr. Angulo: No, sir.

The Referee: Any questions, Mr. Montgomery?

Mr. Montgomery: No, sir.

729

(Discussion off the record.)

IEUAN HARRIS.

Subscribed and sworn to before me
this 19th day of May, 1932.

DONALD J. WARNER Notary Public

Certificate (Seal)

730 *Plaintiff's Exhibit 26.*

(Whereupon, an adjournment was taken to Monday, May 16th, 1932, at 10 o'clock in the forenoon.)

IN RE: The Application of MABELLE HOUGHTON PLUMB, etc.

No. 50 Broadway, New York City,
May 16, 1932, 10 o'clock A. M.

731 Before: TOWNSEND MORGAN, Esq., Referee.

APPEARANCES:

Mr. MONTGOMERY.
Mr. ANGULO.
Mr. EGAN.
Mr. SMYTH.
Mr. KING.

(Met pursuant to adjournment.)

732 WARREN L. MURRAY, recalled, testified further as follows:

By M. Smyth:

Q. Mr. Murray, have you prepared a statement showing what the principal consists of in the incompetent's estate, and what the market value of that principal is? A. Yes, sir.

Q. As distinguished from the inventory value in your accounts? A. I have.

Q. And what is the market value of those securities? A. The present market value, based on approximate prices, as of May 14th, is $872,814.86.

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The Referee: That is the market value as of Saturday?

The Witness: Yes, of the principal.

Q. As of May 14th, A. That is right.

Q. Does that include the mortgages? A. Yes, that does.

Q. But it does not include the real estate? A. It does not include the real estate, but it includes the contents at the houses in Geneva, New York, and Palm Beach, Florida, which I have itemized on the statement.

Q. What is the contents of the house at Palm Beach 734
supposed to be worth? A. Inventoried at $49,751.75.

Q. That is the personalty there? A. Yes, sir.

Q. What is the personalty in the Geneva house? A. Pardon me. I would like to amend that. I have the figures reversed here.

Q. All right. Is the personalty in the Geneva house, that is, $49,000, is that what you are saying now? A. That is right.

Q. What is the personalty in the Palm Beach house? A. $15,689.90.

Q. Has the Trust Company ever made any effort to sell that? A. Which property do you mean, Mr. Smyth? 735

Q. The personal property in both the Palm Beach and the Geneva house. Well, to your knowledge? A. To my knowledge I don't believe they have attempted to sell any of the personalty in the Geneva house. Some efforts may have been made as to the property in Florida, in connection with the sale of the real estate.

Q. That total of $64,000 in personal property— A. Yes, but I have some other items that should be included in that.

Q. Then, I ask you what they are. Let me ask you when that appraisal was made, the $14,000 for the Palm

736 *Plaintiff's Exhibit 26.*

Beach contents, and $49,000 for the contents of the Geneva house? A. To the best of my recollection, I think the appraisals were made in 1926.

Q. And so that figure is not an appraisal of its value on May 14th, 1932? A. No.

Q. All right. Now, then, you say that there are some other items there other than bonds and mortgages? A. Yes, sir.

Q. I would like to know those. A. We have bonds composed of municipal, county and state bonds valued May
737 14th, to $539,150. We also have jewelry valued at $67,418, and a gold watch, unappraised, valued at $632.50.

Q. Anything else besides these? A. There is a small balance of cash as of the date of the last account of $222.71. There are some items of stock which are of questionable value.

Q. Have you appraised those as of May 14th, 1932? A. The stocks?

Q. Yes. A. There is no way of appraising the stocks.

Q. What are they carried at in your inventory? A. The stock is carried as $1000 in the inventory.

Q. That is all the stock, or just one item of stock? A. One item of stock.

738 Q. All right. One item of stock is carried at $1000? A. Yes.

Q. Any other stocks? A. The other stocks are not inventoried at any value.

Q. Now, Mr. Murray, out of that $872,000 of market value, is approximately $122,000 in personalty, including jewelry, contents of two houses and a watch and some stock of questionable value, is that right? A. What did you say the amount was?

Q. Well, approximately $122,000. A. That is right.

Q. So, Mr. Murray, would you say that there was about $750,000 only in marketable securities? A. I will say $750,000.

Plaintiff's Exhibit 26.

739

Q. Then, you gave me a figure of $872,000 as current value of the estate. Now, then, in that $872,000 is approximately $64,000 for the contents of two houses, consisting of personal property valued in 1926 at $64,000, jewelry at $67,000, a watch at $600, and questionable stock at $1000? A. Yes.

Q. All of which would be deducted from the $872,000 and would leave approximately $750,000 in marketable securities? A. Yes.

Q. Are there any other items that I would deduct from the $750,000 if I was trying to get the marketable securities that could be liquidated? A. I would not say so, no, sir. 740

Q. Now, may I see that statement? A. Yes, sure (handing paper.)

Mr. Smyth: Mr. Referee, I would like to have that go in evidence, because these are the exact figures, and I called them out in round numbers.

The Referee: Any objection?

Mr. Montgomery: No objection.

(Paper received in evidence and marked Special Guardian's Exhibit 1, of this date.) 741

Q. Now, Mr. Murray, what is the income from that $750,000? A. The annual income, as I have approximated it at the present time, is $37,731.75.

(Discussion off the record.)

Q. In that $907,000 worth of liquid value of the accumulated income, Mr. Murray, that has no items of personalty or contents of houses or stock in it, has it? Do you remember that you testified the figure of

742 *Plaintiff's Exhibit 26.*

$1,051,000 inventory value of the accumulated surplus income had a market value of approximately $907,000. What I would like to know is if all of that $907,000 is in marketable securities? A. Yes, that is all in marketable securities, with the exception, perhaps, of the mortgage on the Spring Lake property. I don't know how marketable that is.

Q. Then, let me correct my question and say it is either in marketable securities or in mortgages? A. Yes.

Q. There are no items of tangible personal property?
743 A. None.

Q. What day did you figure the marketable value of the accumulated surplus? A. May 14th.

Q. And did you figure that as of Saturday when you were here? A. Oh, no, no.

Q. You took it off as though you had already figured it out before you came here? A. I am trying to recall the date now.

Mr. Montgomery: Was it in the near past?

The Witness: It was about a week ago.

The Referee: Some time during the month of May?
744

The Witness: Yes.

Mr. King: It was Thursday, wasn't it?

The Witness: It was before that.

Q. It was during the month of May, 1932? A. Just about a week ago, if I can figure it right.

The Referee: Now, it is from this $872,814.86 and the approximated $907,000 that the income is derived to support the incompetent and to make the distributions to the various beneficiaries, is that correct?

Plaintiff's Exhibit 26.

745

The Witness: That is right. Income from the Committee estate.

Mr. Angulo: There is the Houghton estate income too.

The Witness: I thought when you asked your question you were referring only to the income from the securities actually held in the Committee estate account.

Mr. Montgomery: There is other income, is there not, Mr. Murray?

The Witness: Other than those who own se- 746
curities?

Mr. Montgomery: There is income from the Houghton estate, is there not?

The Witness: Yes.

By the Referee:

Q. Can you give me an idea as to what the total income is from the two items I have just alluded to, plus the income from the Houghton estate? A. I believe the best answer to that question would be the approximation of income, or the receipt of income, for the year 1931.

Q. That is good enough. A. Which amounted to 747
$460,183.62, which included income received from the Houghton trust, income received from the securities constituting principal, and income from securities which constitute invested income.

Q. Now, assuming that you took from the principal of the estate $872,814.86, you would deprive that amount as just stated by you of the income amounting to $37,731.75, is that correct? A. That is right.

By Mr. Smyth:

Q. Mr. Murray, if this application was granted by the

748 *Plaintiff's Exhibit 26.*

Court to take out $500,000, how much would that deprive the income of the incompetent? A. You mean take out $500,000?

Q. I mean take out $500,000 of the accumulated surplus which has a market value of $907,000, approximately; how much would that deprive an income to the estate? What is the average return of this estate? A. I should say that the average return would be—

Q. About 4 per cent? A. A little bit better than 4 per cent.

749 Q. Would you say it would deprive it of income of between $20,000 and $22,500?

The Referee: This is, of course, generally speaking.

(Discussion off the record.)

A. It is a little bit difficult—

The Referee: This is approximately.

Q. (Continued) What is the average yield on the income on the accumulated surplus? A. Invested income?

750

The Referee: Yes.

The Witness: I should say a little bit in excess of 4 per cent.

The Referee: A little in excess of 4 per cent?

The Witness: Yes, as an average.

The Referee: So you would say if you took a half million dollars and distributed it, it would deprive it of about $20,000 income, generally speaking?

The Witness: I should say it would be approximately that.

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751

Mr. Smyth: I have no more questions to ask. (Discussion off the record.)

By Mr. Smyth:

Q. You have already testified that the income from the Houghton estate has been reduced by $37,000 by the lowering of that dividend of approximately 10 per cent? A. I am not certain of the exact figures to which I have testified, but I know, as I testified, as to the reduction in the Houghton income.

752

The Referee: Any more questions, Mr. Montgomery?

Mr. Montgomery: No.

The Referee: You, Mr. Angulo?

By Mr. Angulo:

Q. Mr. Murray, what was the total income from the estate of the incompetent as testified before by you, excluding, of course, the Houghton trust income?

Mr. Montgomery: What year are you asking him about?

753

Mr. Angulo: At the present time.

A. You refer to the 1931 figure?

Q. Yes. A. The total income from the Houghton trust received was $382,770.84.

Q. I beg your pardon? A. $382,000.

Q. No, I said exclusive of the Houghton trust. A. Exclusive of the Houghton income—

Q. From the estate of the incompetent alone. A. $77,412.78.

Q. I notice that in the Special Guardian's Exhibit 1, the amount of the income received from the principal of

754 *Plaintiff's Exhibit 26.*

the incompetent's estate is stated to be $37,731.75. A. That is approximately correct.

Q. So that the difference represents the income received on the $907,000 during the year 1931? A. That is right; that is approximately $40,000.

Q. So that the rate of return on that $907,000 is, as I figure it, nearer 4-½ per cent than 4 per cent? A. Yes. I believe I said it was slightly in excess of four.

Q. Now, referring again to Special Guardian's Exhibit 1, these participating mortgages, you say at present not
755 immediately redeemable at par? A. Yes, sir.

Q. Will you explain just what you mean by that? A. Well, I mean that if orders were placed to sell the mortgages now held today, a sale could not be consummated at once. Mortgages have to be sold in the order in which they are placed.

Q. That might take some time? A. Yes, it might take considerable time. In some instances it might take considerable time depending on the amount that is put on for sale.

By Mr. Smyth:

756 Q. Have you a copy of that Special Guardian's Exhibit No. 1, Mr. Murray? A. Yes, sir.

Q. Can I have that? A. Surely.

Q. And you testified that the figures here are all correct? A. You mean on this statement?

Q. On Special Guardian's Exhibit 1, all these figures are correct. I have asked you as to some of them, but not as to all. A. Yes, these figures are nearly as correct as you can possibly get them.

Q. Is this memorandum made up by you from the books? A. No, I made it up on the values at which the securities were currently quoted. As to items of bonds, stocks and mortgages—

Plaintiff's Exhibit 26.

757

Q. I mean you checked up those market values yourself? A. That is right. It is a little bit difficult to value municipal securities. You have to figure them on the yield basis, and while I did not have the actual current quotation on the last sale, I obtained the value as nearly as it could possibly be gotten.

The Referee: That might be a shade better or a shade worse.

The Witness: Yes, sir.

The Referee: Any more questions?

758

(No response.)

The Referee: Thank you very much, Mr. Murray.

The Witness: I would like to amend one answer I made the other day. I believe Mr. Smyth asked me as to the legality of the mortgages held in the Committee estate account, and I think I testified that all of them were legal mortgage participations. There is a mortgage held in the account which is on property in Spring Lake, New Jersey, which would not be a legal investment.

By Mr. Angulo:

759

Q. That is a purchase money mortgage on the sale of some real estate? A. Yes, sir.

By Mr. Montgomery:

Q. That is a purchase money mortgage on some real estate? A. Yes.

By the Referee:

Q. What does that amount to? A. $28,000

760 *Plaintiff's Exhibit 26.*

By Mr. Smyth:

Q. Is that a first or a second mortgage? A. I believe it is a first mortgage. I am sure it is.

Q. Do you know where the property is located in Spring Lake? A. Our bond and mortgage records show that the mortgage covers property at the northeast corner of Warren and First Avenue, Spring Lake, New Jersey.

Q. Do you know whether that is improved or not? A. Yes, that is improved.

761 Q. Do you get your interest regularly on that, or is that in default? A. I am pretty sure that the interest has been paid quite regularly on that.

By Mr. Montgomery:

Q. That is a piece of property, Mr. Murray, which was owned by the incompetent and sold since she has been declared incompetent? A. That is right.

Q. And the mortgage is a part of the purchase price? A. That is right.

762 The Referee: Anything else?

(No response.)

The Referee: Thank you very much Mr. Murray.

Mr. Montgomery: What interest does that bear?

The Witness: 6 per cent.

WARREN L. MURRAY

Subscribed and sworn to before me
this 19th day of May, 1932.

TOWNSEND MORGAN,
Referee.

Plaintiff's Exhibit 26.

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FREDERICK J. SCHLOBOHM, a witness, first being duly sworn, testified as follows:

By the Referee:

Q. Where do you live, Mr. Schlobohm? A. Mount Vernon, New York.

Q. Can you give me the address, street address? A. 20 William Street.

Direct Examination by Mr. Angulo:

764

Q. Mr. Schlobohm, are you connected with the City Bank-Farmers Trust Company? A. Yes, sir, I am.

Q. In what department? A. I am chief clerk of the Administration Department.

Q. Are you familiar with the trust created under the Charles F. Houghton will? A. Yes, sir, I am.

Q. And the incompetent here, Mrs. Vail, is the life beneficiary of that trust? A. Yes, sir.

Q. You are the person in charge of the administration of that trust? A. Yes, sir.

Q. Are you familiar with the securities now held by the Trust Company as trustee of that trust? A. Yes, sir, I am. I have a statement of securities which we held as of April 8th, 1931, the date our accounting was filed in the Surrogate's Court of Steuben County, and there have been little changes in the securities since that date. 765

Q. Have there been any substantial changes? A. No, sir, there have not been.

Q. Will you tell us what the securities are in that account? A. We have in the account stock of the Corning Glass Works, common and second preferred; and also securities of the Steuben Securities Corporation.

Q. Will you state the number of shares? A. We have

766 *Plaintiff's Exhibit 26.*

15,120 shares of the second preferred stock of the Corning Glass Works.

Q. Will you state after the security the approximate yield thereof? A. 15,120 shares second preferred stock, 6 per cent; annual yield $90,720.; 30,240 shares, common stock, of Corning Glass Works which pays $226,800. Then we have other securities, most of them municipal, county state, bonds at an original inventory price of $1,148,000. Income at the approximate rate of 4 per cent—perhaps a little better than 4 per cent—that would be about
767 $45,000. The total income is the aggregation of these various items of income.

Q. Have you prepared, at my request a statement of the aggregate income received from the Houghton trust between the years 1920 to 1925, inclusive? A. Yes, sir.

Q. What is that? A. The total income for those six years was $1,009,288.64.

Q. What was it year by year? A. For 1920 it was $103,627; 1921, $149,209; 1922, $129,073; 1923, $117,941; 1924, $370,334; 1925, $139,102. And then the total is $1,009,288, or an average of $166,666 a year.

Q. Have you a statement there of the income since
768 1926 to date on the Houghton trust? A. I have the figures here, but I have not taken them off. I had it understood that Mr. Murray had already testified to those figures.

Mr. Smyth: Except 1926, because that is the year she was declared incompetent.

The Witness: I have the figure for 1926 also.

Q. Will you tell us what they are? A. Yes. In 1926 the income is $440,661.

(Discussion off the record.)

Q. I show you Schedule H of what purports to be the account of City Bank-Farmers Trust Company as trus-

Plaintiff's Exhibit 26.

769

tee under the Houghton will, containing a list of securities that purports to show a statement of the present condition of said trust estate as of the date of the account, and ask you if this list substantially shows the securities and other property now held in the Houghton trust? A. Yes, sir, it does.

Mr. Angulo: I offer that statement in evidence.
The Referee: Any objection?
Mr. Smyth: No.
The Referee: It is received in evidence.

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(Schedule H above referred to received in evidence and marked Committee of the Property Exhibit 1, of this date.)

(Discussion off the record.)

FREDERICK J. SCHLOBOHM

Subscribed and sworn to before me
this 19th day of May, 1932.

TOWNSEND MORGAN
Referee.

771

WARREN L. MURRAY, resumed:

By Mr. Montgomery:

Q. Mr. Murray, will you please give me the amount of income received from the Houghton Estate for the years 1926, 1927, 1928, 1929, 1930, and 1931? A. Yes, sir; for the year 1926 there was received from the Houghton Es-

772 *Plaintiff's Exhibit 26.*

tate $135,591.27. That included income received from August 12th, 1926, to December 31st.

Mr. Smyth: That is not a full year, then?
The Witness: No, a half a year.

A. (Continued) For the year 1927 there was received from the Houghton estate $381,652.11. For the year 1928 there was received from the Houghton estate $393,112.34. For the year 1929 there was received from The Houghton estate $367,323.87. For the year 1930 there was received
773 from the Houghton estate $378,016.09. For the year 1931 there was received from the Houghton estate $382,770.84.

(Discussion off the record.)

WARREN L. MURRAY

Subscribed and sworn to before me
this 19th day of May, 1932.

TOWNSEND MORGAN
Referee.

774

FREDERICK J. SCHLOBOHM, resumed:

By Mr. Montgomery:

Q. Will you please state whether the income which you gave for the years 1920, 1921, 1922, 1923, 1924, 1925 and 1926 as received from the estate of Houghton was the gross income or the net income? A. It was the net income.

Plaintiff's Exhibit 26.

By the Referee:

Q. When you say net income, that is the gross income less the trustee's commission? A. And real estate expenses.

By Mr. King:

Q. And income taxes? A. No, sir; the income taxes are carried as a payment on account of income to her, because we paid the taxes, subject to her instructions.

In 1926 up until the time that Mrs. Vail became incompetent, we actually applied to her use either by paying taxes or paying it over to her, $42,300.77. Then, after she became incompetent, first we made a payment to Mrs. Plumb for her maintenance of $7,627.27; and then, during the remainder of the year, we paid over to ourselves as Committee for her $390,732.97, or a grand total as I testified to before, of $440,661.01.

(Discussion off the record.)

A. (Continued) Mr. King calls my attention to the fact that the dividends for the year 1926 on the Corning Glass stock amounted to $589,680. That is correct. And in addition to that we received approximately $40,000 of additional income on the other securities in the account, or a gross total of approximately $620,000 income on securities, which means, that during the year 1926 the total collections over disbursements were about $180,000. From time to time we carried accumulated income in the account, invested it. At the present time we have an accumulation of income in the account.

By Mr. Angulo:

Q. Does your account show when that was paid over to the trust company as Committee of Mrs. Vail's es-

778 *Plaintiff's Exhibit 26.*

tate? A. In subsequent years it was paid over to her—this does not show actually when the full amount of $180,000 was paid over to her. It was paid over from time to time. At the present time, according to the accounting, we have only a small amount of accumulated income on hand which I understand from Mr. Heustis will be necessary to meet certain expenses which he had intimated are chargeable against income in the accounting proceeding. I am not very familiar with that matter. I can tell you what the amount of—

779 Q. Wait a second. Did you hear Mr. Murray testify as to amounts of income paid to the Committee during the years 1926, 1927 and 1928 to date? A. Yes, sir.

Q. What I would like to get is, does that $180,000 represent the difference between the $440,000 that you testified to and the figure that Mr. King gave you; is that reflected and included in any amounts that Mr. Murray testified to? A. Yes, sir.

The Referee: Mr. Special Guardian?

Mr. Smyth: I have no questions to ask.

The Referee: Mr. Montgomery?

Mr. Montgomery: No.

780 The Referee: Mr. King?

Mr. King: Yes, I have a few questions.

By Mr. King:

Q. When you said there was a small amount of income left, you were speaking then of income from the Houghton estate? A. Yes, sir.

Q. Not the surplus of income of Mrs. Vail's own property? A. No, sir.

By Mr. Smyth:

Q. When did Mr. Houghton die? A. Mr. Houghton died on March 29th, 1897.

Plaintiff's Exhibit 26.

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The Referee: Anything else?

Mr King: No, sir.

The Referee: All right, thank you very much.

Mr. King: Mr. Referee, the order of reference does not recite any answer on the part of the General Guardian, although one was filed and served on all parties. I would like to leave a copy of that answer as part of your record. It is just the usual guardian's answer.

The Referee: Yes, surely. Is there any suggestion of any amendment to the petition, or anything of that character?

782

Mr. King: I do not think so at this time.

The Referee: Not at this time?

Mr. King: No, sir. I thought if we had to amend it at all, we would amend it before the Court.

The Referee: All right. Can you think of anything else, Mr. Special Guardian?

Mr. Angulo: Does your Honor wish a memorandum?

The Referee: I would like to have it. If you can give me a short memoranda, both sides, I think it would be very helpful. Can you do it within the next day or so?

Mr. Angulo: Yes, surely.

The Referee: Have you any suggestions?

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Mr. Angulo: As far as the matter is discretionary, we do not feel that the Committee can be of any help in the matter. The guardian is here representing the incompetent, but the point that does trouble me, and I have told them very frankly is this, the matter whether the Court has the power to grant this application on the basis of this petition. It is to me, not a matter of obtaining an allowance. It seems to be the idea of distributing part of this incompetent's property in anticipation more or less of her death.

I do not think the Court simply because a person is in-

784 *Plaintiff's Exhibit 26.*

competent has any inherent power to give away a person's property.

There is plently of authority for the proposition. It seems to me if relatives of the incompetent are in need, and using the word "need" in a very broad and liberal sense, the Court will do what the incompetent would presumably have done, and on that very basis there has been already entered an order in favor of each of the parties here of $50,000, making a total of $100,000.

Now, if it is a matter of coming in and stating that is
785 not enough, because there was an indication here of one of the children of Mrs. Plumb going to college that will require something more than she has had—if there is any showing of that character which convinces the Court it should be increased, I can see that, but I am frank to say I have not been able to find any authority on the proposition where the Court can say here is an awful lot of money that the incompetent will not need, let us pay it out to the next of kin, and that is the thing that troubles me, whether the Court has the power to do that.

The Referee: You have got some cases?

Mr. Angulo: Yes.

The Referee: So you send them to me in your mem-
786 orandum, and if it is not too long, make that statement, just say what you did now, and you might submit, Mr. King.

Mr. King: I will submit a memorandum. I will be perfectly frank, your Honor. I have been to Mr. Angulo, and I do not pretend to you now that $50,000 is not adequate for the support or maintenance of three small boys. I think it is. In addition to that, I am perfectly frank to say that their father is perfectly able to take care of them and give them such education and physical comforts as they need.

Plaintiff's Exhibit 26.

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I do think, however, in a case of this sort where the income is almost entirely derived from the will of Charles F. Houghton, and in that will that he intended the income should be used for his widow. (I think the will itself has the expression "to use" it for that purpose,) and where it is impossible for her to use it by reason of the misfortune of her mental and physical condition, that then the Court can make an advancement, and in this case it is proper that it should do so.

I think the policy of the law as expressed in the statutory law is that the accumulations of income go to those 788
entitled to the next eventual estate

I think there are cases in which the court has held that an advancement was permissible. In the Brinkerhoff case that was affirmed in the Court of Appeals, there the question came up as to whether or not a certain distribution which had been made out of the estate should be treated as gifts, or whether they should be treated as advancements.

In that case, the Court said that the order did not provide that that should be treated as advancements and, therefore, they were not so treated, but, nevertheless, as a court of equity it had full authority to make such conditions in the order, and that equitable powers were broad 789
enough.

Now, Mrs. Vail is in a position where she cannot make a will. There is no question in the world who is going to get this property.

The Court of Appeals in the Flager case has held that the Court will stand in the shoes of the incompetent, and try to do what the incompetent person would have done if she were competent.

Mrs. Vail was always generous to her children. It does seem to me she would have regard of her husband's wishes in the matter, and she would have her children

790 *Plaintiff's Exhibit 26.*

have the benefits that she would like to have the children enjoy.

Here is Mrs. Plumb, who is 49 years of age. None of these grandchildren were alive in Mr. Houghton's time, but certainly if we can carry ourselves back to that time there can be no question that Mr. Houghton would wish these children to have the income.

I think Mrs. Vail, if she were in sound mind would want to carry out her husband's wishes. The only theory I can stand on in this court is, I think, that the advance-
791 ment is proper, and should be made under the circumstances.

Mr. Montgomery: With reference to Mr. Angulo's statement of the distribution, there is no question but what the Court can grant an allowance, and it can grant an allowance to go back several years. It has done so, and we will hand that case to you, so that there is no difference between granting an allowance here. For instance, if the Court should say she, the petitioner, should get an allowance of $50,000 a year extra, and that the three grandchildren should have $50,000 a year extra divided between them, but the Court in addition can say
792 that allowance shall date back two or three or four or five years, even unto the date of incompetency, and if you multiply that $50,000 a year for just four years, you will get the $200,000 we are asking for; so if the Court has the authority to starting the allowance back four or five years, there is no question but what it can do it in a lump sum it seems to me, and then continue the allowance on with the extra $50,000.

Mr. Duryee: While this income was accumulated for the past four or five years, there is no doubt that the Court had jurisdiction that allowance should be made. I do not feel that anything mysterious has happened to the

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income since the accumulation which deprives the Court from the jurisdiction it unquestionably had while it was accumulating. In other words, the Court can say now, retroactively, that it will distribute and proportion part of the income that has accumulated during those years. It seems to me if it had jurisdiction while the income was accumulating, it still has it. There is no doubt about it, in my mind.

The Referee: Have you any cases along that line of thought?

Mr. Duryee: I have.

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The Referee: Will you submit those to me, please?

Mr. Duryee: Yes.

The Referee: And send me a memorandum of that Brinkerhoff case.

Mr. King: In that case, the Court refers to a number of decisions, because it had been the custom of the incompetent person to share some of the money's with charitable institutions. I think the Court can do it. I think the circumstances here warrant it.

The Referee: Under the form of extra allowances?

Mr. King: Yes.

The Referee: Rather than a distribution of principal, as Mr. Angulo said?

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Mr. Angulo: I will say in regard to Mr. King's argument, I know that case where the issue between us, is the same. My position is what that Court meant was simply this: If they did give an allowance under the general authority, they could attach to it a condition as they saw fit, that it should be treated as an advancement. In other words, if the Court here decides that Mrs. Plumb should have an allowance and not the infants represented by Mr. King, that the Court would stipulate and put in the order provision that in the event that Mrs. Plumb should be one of the next of kin of this incompetent, she would

796 *Plaintiff's Exhibit 26.*

have to put that amount in hodge-podge and be charged interest against it, and be treated as an advancement.

Mr. Montgomery: I think it would be all right if she got it and the others did not. Of course, when the estate was finally distributed, that allowance would have to be deducted from her share, of course.

Mr. King: I think in most of these cases we have been met by collateral relatives, and in that case the Court had some reluctance in granting applications, but in this particular case we have a situation where the persons to
797 be benefitted are the persons who most certainly will receive this property ultimately. I do not think that has always been so. I think in some of the cases the Court has said it will not undertake a distribution in advance of the death of an incompetent, because it cannot fairly assume the property will ultimately go to them, and might ultimately be taking away something from somebody who will be benefitted. That is not so in this case, and here the property must go to the people who will benefit by it.

The Referee: I think it is something to be considered.

Mr. Angulo: Mr. King's statement that it must go, does not follow, if Mrs. Plumb does not outlive her
798 mother. Then, it would go to her son. In other words, we cannot be sure who will be next of kin of Mrs. Vail, ultimately, but it is very unlikely there will be anybody else, except the ones who are here.

The Referee: Yes, but we will take into consideration those contingencies. Is there anything more to be said?

Mr. King: No, sir, I do not think so.

The Referee: Do you want to say anything more, Mr. Special Guardian.

Mr. Smyth: No.

The Referee: If you will send me that memorandum, I will appreciate it very much.

Plaintiff's Exhibit 26.

799

STIPULATED that the full fees of the stenographer, and the Referee, shall be paid by the Committee of the Property, and same shall be taxed as costs.

HEARINGS CLOSED.

FREDERICK J. SCHLOBOHM

Subscribed and sworn to before me
this 19th day of May, 1932.

TOWNSEND MORGAN
Referee.

800

In Re: The Application of MABELLE HOUGHTON PLUMB, etc.

No. 30 Broadway, New York City.
May 16, 1932, 2 o'clock P. M.

Before: TOWNSEND MORGAN, Esq., Referee.

APPEARANCES:

MR. MONTGOMERY.
MR. ANGULO.
MR. EGAN.
MR. SMYTH.
MR. KING.

801

Mr. Montgomery: It is hereby stipulated, subject to the approval of the Court, by all the parties hereto that the petition of MaBelle Houghton Plumb be amended as follows:

The title of said petition shall read:

"New York Supreme Court, New York County

In the Matter of the Application of MaBelle Houghton Plumb for an additional allowance to be paid to herself and others from the income received by the City Bank

802 *Plaintiff's Exhibit 26.*

Farmers Trust Company as Committee of the Property of Helen Hall Vail, an Incompetent Person."

It is further stipulated, subject to the approval of the Court, that the prayer of said petition be amended to read as follows:

"Therefore, your petitioner prays for an order directing the City Bank-Farmers Trust Company, as committee of the property of said incompetent, to pay an additional allowance of $25,000 annually to your petitioner, MaBelle Houghton Plumb, and $25,000 annually to Ieuan Harris,
803 as general guardian of John H. Harris, William R. Harris, David F. Harris, infants, out of the income received by said committee, and that said additional allowance of $25,000 to said MaBelle Houghton Plumb and to said Ieuan Harris, as said General Guardian, be retroactive for the past five years, payable out of the accumulated surplus income in the hands of the said committee; viz. to your petitioner the sum of $125,000 and said Ieuan Harris, as General Guardian, the sum of $125,000." and that an order of this Honorable Court may be entered in accord with this stipulation, without notice.

(Discussion off the record.)

804 Mr. Angulo: On behalf of the Committee of the Property I would like to respectfully submit to the Court that there is no evidence before it to indicate any reason as to why this extra allowance aggregating $250,000 should be granted and that the evidence now produced is substantially the same as that produced at the former hearing, at which allowances aggregating $100,000 per annum were granted and that in the absence of such proof the Court has not power to direct the distribution which is requested here.

As regards the future increase, there is evidence in the record that the applicant's needs will increase by reason of the fact that her son is now going to college and there-

805

fore the foregoing objection would not apply to the increase of the allowance in the future.

The Committee also urges the objection as regards the proposed distribution to the Harris infants on the ground that the record shows on its face that there present means are ample.

Mr. King: On behalf of the General Guardian he thinks it is his duty to submit the rights and interests of these infants to the protection of the Court and desires to record his insistence that any allowances that are made should be measured by the equality of treatment as between the petitioner and the infant wards of the General Guardian.

806

Mr. Montgomery: The petitioner, in reply to the objections of the Committee, states that in the opinion of her attorneys it is not necessary to show an actual need for the extra allowances of $25,000 per annum or for the making of the allowances retroactive for five years, but that the Court has ample power to grant an allowance if he finds from the record that the probabilities are that the incompetent, if competent, would grant the allowances as requested.

807

Mr. Angulo: It is stipulated by the parties that the answers heretofore filed by the various respondents shall be deemed to also apply to the petition as amended, and also that the briefs submitted should also apply to the amended petition.

Mr. Montgomery: We rest.

Mr. King: The General Guardian rests.

Mr. Smyth: I rest.

(Whereupon, at 3 o'clock P. M. the hearing was closed.)

808 *Plaintiff's Exhibit 26.*

No. 2866

State of New York } ss.:
County of New York }

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, DO HEREBY CERTIFY, That I have compared the preceding with the original Testimony before Referee on file in my office, and that the same is a correct transcript therefrom, and of
809 the whole of such original.

Filed. May 23, 1940.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

ARCHIBALD R. WATSON
County Clerk and Clerk of the Supreme Court,
(Seal) New York County.

810

Plaintiff's Exhibit 28. 811

NEW YORK SUPREME COURT

NEW YORK COUNTY

REPORT OF THE REFEREE.

IN THE MATTER

of the

Application of MaBelle Houghton Plumb for an allowance to be paid to herself and others from the income now in the possession of the City Bank Farmers Trust Company, as Committee of the property of 812

HELEN HALL VAIL,

an incompetent person.

TO THE SUPREME COURT OF THE COUNTY OF NEW YORK:

I, TOWNSEND MORGAN, to whom the above matter was referred by an Order of this Court signed at Special Term, Part I thereof, on the 4th day of May, 1932, to take proof of the facts alleged in the petition herein and to report to the Court with all convenient speed upon the matters referred to me, with my opinion, do respectfully report as follows: 813

Before proceeding with the examination and hearing of the matter so referred to me, I duly took and subscribed the statutory oath as Referee, and the same is hereto annexed.

The hearings in this proceeding were duly held before me at my office at No. 50 Broadway, Borough of Manhattan, City of New York, on the 13th day of May, the

814 *Plaintiff's Exhibit 28.*

16th day of May, and the 20th day of May, 1932, upon due notice to Messrs. Dean, King & Smith, attorneys for Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants; to Messrs. Taylor, Blanc, Capron & Marsh, attorneys for the City Bank Farmers Trust Company, as Committee of the property of Helen Hall Vail, the incompetent, and upon Cornelius J. Smyth, Esquire, of the Borough of Manhattan, City of New York, duly appointed in said Order as Special Guardian for and on behalf of the said
815 Helen Hall Vail, the incompetent, to appear and defend this proceeding on her behalf.

The following parties appeared at said hearings: MaBelle Houghton Plumb, the petitioner, by Montgomery, Peabody & Grace, her attorneys; Ieuan Harris, as General Guardian of said infants, by Dean, King & Smith, his attorneys; City Bank Farmers Trust Company, as Committee of the property of Helen Hall Vail, the incompetent, by Taylor, Blanc, Capron & Marsh, its attorneys, and the said Special Guardian, Cornelius J. Smyth.

The testimony taken before me, and such exhibits as are not now filed in the office of the Clerk of the County of New York, are annexed to this report.
816

I FIND AS FOLLOWS:

That MaBelle Houghton Plumb, the petitioner, is the daughter of Helen Hall Vail by a prior marriage to Charles F. Houghton, now deceased.

That after the death of Charles F. Houghton, the said Helen Hall Vail married one Charles D. Vail, who died in the year 1922. That there was no issue of said second marriage.

That on the 12th day of August, 1926, the Farmers' Loan and Trust Company, (now the City Bank Farmers

Plaintiff's Exhibit 28.

Trust Company), was appointed Committee of the property of Helen Hall Vail, and MaBelle Houghton Plumb, the petitioner, was appointed the Committee of the person of Helen Hall Vail. 817

That said Helen Hall Vail will be 77 years of age in August, 1932, and is a widow.

That at the time the Farmers' Loan and Trust Company (now City Bank Farmers Trust Company) was appointed Committee of the property of said incompetent, there came into its possession certain property, both real and personal, which is now inventoried at $954,599.08, and which is held by the Committee of the said incompetent as principal. 818

That the said Helen Hall Vail by her first husband had three children, one of whom Florence Houghton, died in infancy; another of whom Laura Houghton Harris married Ieuan Harris on the 16th day of July, 1914 and died the 31st day of August, 1925, leaving three children; John H. Harris, now sixteen years of age, William R. Harris, now fifteen years of age, and David F. Harris, now twelve years of age; and your petitioner, who is the only other and surviving child of said Helen Hall Vail; and that said petitioner has only one child, a son, Joseph H. Plumb, Jr., who is now nineteen years of age. 819

That the said infant children of Laura Houghton Harris reside with their father, Ieuan Harris, at Salisbury, Connecticut, and that said Ieuan Harris has heretofore been duly appointed general guardian of said three children, has duly qualified as such, and is still acting as such.

That the Last Will and Testament of said Charles F. Houghton directs that upon the death of his wife, the said Helen Hall Houghton, now Helen Hall Vail, the incompetent, his residuary estate shall be divided into two equal parts, one to be held for his daughter, Laura Houghton Harris, the income to be paid to her during

820 *Plaintiff's Exhibit 28.*

her life, and upon her death leaving issue the principal of said part or share to be divided between her issue, share and share alike. The other of said part or share to be held for his daughter, MaBelle Houghton Plumb, the income to be paid to her during her life, and upon her death leaving issue the principal of said part or share to be divided between her issue, share and share alike.

That prior to the respective marriages of Laura Houghton Harris and MaBelle Houghton Plumb, the daughters of the said incompetent, they lived with their mother.

821 That after their marriages, their mother, Helen Hall Vail, gave to them at various times, certain sums of money, one specific gift to each of them being the sum of $30,000.00.

That prior to the time when the petitioner noticed any peculiarity in the said Helen Hall Vail, she had repeatedly and over a long period of years evinced affectionate regard for her two daughters, and after the death of Laura Houghton Harris, toward her grandchildren, and had contributed various sums to them for their support and maintenance.

That said Helen Hall Vail is now at Dr. MacDonald's House, Central Valley, New York, to which institution she

822 was committeed by an Order of the Supreme Court, dated the 10th day of December, 1926, where she has all the comforts to which her position and affluence entitle her, and which are possible under the circumstances.

That the disease from which the said Helen Hall Vail is suffering is cerebral arterio sclerosis, with dementia, hallucinations and senile arterio-sclerotic chorea, and that the same is incurable, and there is no possibility of her ever being able to take care of her property.

That there has been a search made, and no Will of the incompetent has been found.

That upon the death of said Helen Hall Vail, one-half of her property now held by the Committee, representing

Plaintiff's Exhibit 28.

accumulated income and the property received by the Committee at the time of its appointment, will vest in said MaBelle Houghton Plumb, and one-half will vest in said John H. Harris, William R. Harris and David F. Harris.

That no Will of the incompetent having been discovered, the granting of the allowances herein prayed for, cannot interfere with any testamentary plan of the incompetent, and the inference is clear from the past generosity displayed by the incompetent toward your petitioner, and her grandchildren, that the granting of the allowances would be in accord with the intention and desires of the incompetent were she now competent to make them herself.

The net income received from the Houghton Estate prior to the adjudication is as follows—for 1920, $103,627.00; for 1921, $149,209.00; for 1922, $129,073.00; for 1923, $117,941.00; for 1924, $370,334.00; for 1925, $139,102.00; a total of $1,009,288.00, or an average of $166,666.00 a year. The amount in 1926 was $440,661.00.

That since the date of its appointment, the income received by the Committee for the account of the incompetent and the expenditures each year, are as follows:—

During the year 1926

From the Houghton Estate....	$135,591.27	
From accumulated income.....	17,678.00	
	$153,269.27	
That the disbursements during ing that year amounted to..	58,413.21	
Leaving an unexpended surplus income for that year of....		$ 94,856.06

826 *Plaintiff's Exhibit 28.*

During the year 1927		
From the Houghton Estate...	$381,652.11	
From accumulated income....	44,987.17	
	$426,639.28	
That the disbursements during that year amounted to.....	278,615.55	
Leaving an unexpended surplus income for that year of....		148,023.73
During the year 1928		
From the Houghton Estate...	$393,112.34	
From accumulated income.....	60,473.26	
	$453,585.60	
That the disbursements during that year amounted to.....	269,683.40	
Leaving an unexpended surplus income for that year of		183,902.20
During the year 1929		
From the Houghton Estate....	$367,323.87	
From accumulated income.....	64,425.62	
	$431,749.49	
That the disbursements during that year amounted to.....	259,829.86	
Leaving an unexpended surplus income for that year of.....		171,919.63

Plaintiff's Exhibit 28.

829

During the year 1930

From the Houghton Estate....	$378,016.09	
From accumulated income.....	69,185.97	
	$447,202.06	
That the disbursements during that year amounted to.....	235,921.36	
Leaving an unexpended surplus income for that year of.....		211,280.70

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During the year 1931

From the Houghton Estate....	$382,770.84	
From accumulated income.....	77,412.78	
	$460,183.62	
That the disbursements during that year amounted to.....	219,087.38	
Leaving an unexpended surplus income for that year of		241,096.24

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That the unexpended surplus income accumulated in each of these years has been invested by the Committee and is inventoried at $1,051,078.56

The market value as of May 14th, 1932 is and is invested in marketable securities and mortgages. $907,000.00

The market value of the invested property of the incompetent coming into the possession of the Committee was, as of May 14th, 1932 ..... $872,814.86

832 *Plaintiff's Exhibit 28.*

The inventoried value of the contents of the house at Geneva, N. Y., is..... $49,751.75

The inventoried value of the contents of the house at Palm Beach, Fla., is..... $15,689.90

After hearing all of the parties to this proceeding, and the testimony of the witnesses, and considering all the facts and circumstances, the advanced years of the incompetent and the incurable nature of her disease, and the fact that the first husband of the incompetent, namely
833 Mr. Charles F. Houghton, by the terms of his Will left his entire estate to the Farmers' Loan & Trust Company (now City Bank Farmers Trust Company) as Trustee, for the use of his widow during her life, and that upon the death of the widow, this estate was to be equally divided, one-half for the benefit of Laura with the remainder to her issue, which issue in this proceeding are represented by their General Guardian, and the other one-half for the benefit of MaBelle Houghton Plumb, the petitioner, with remainder to her issue.

It seems to the Referee that from the provisions of Mr. Houghton's Will that his desire was to benefit not only his widow, but also his daughters and their issue.
834 It seems to the Referee that it is entirely clear from the record before him that the relationship existing between the incompetent and her daughters during her normal life was characterized by a spirit of generosity evidenced by substantial gifts to them and by many tokens of affection, and a desire on her part to carry out what she conceived to be the wishes of her deceased husband.

There came into the possession of the Committee of the incompetent, namely the City Bank Farmers Trust Company, as capital belonging to the incompetent, at the present inventoried at $954,599.08. There appears in addition to the large dividend paying securities of the Corning Glass Company now in the principal account of the

Plaintiff's Exhibit 28.

Houghton Estate, various municipal, county and state first mortgage bonds, amounting to, at original inventory value, the sum of $1,148,000 and yielding over 4%, none of which are in default. There is also the accumulated surplus income at present market amounting to $907,000. It is from the latter amount, namely $907,000 accumulated income the petitioner asks this Honorable Court for an allowance to her and it seems that the annual income of the incompetent is vastly in excess of the amount required to maintain her in comfort and luxury and to pay for the care and maintenance of her real property, taxes, etc., and the annual amount to be paid by the Committee under said Order of January 14, 1927, and the parties having stipulated that the petition be amended subject to the approval of the Court as follows:

The title of said petition shall read as follows:

NEW YORK SUPREME COURT

NEW YORK COUNTY

In the Matter

of the

Application of MABELLE HOUGHTON PLUMB for an additional allowance to be paid to herself and others from the income received by the City Bank Farmers Trust Company, as Committee of the Property

of

HELEN HALL VAIL,

an incompetent person.

That the prayer of said petition be amended to read as follows:—

Plaintiff's Exhibit 28.

838 Wherefore your petitioner prays for an Order directing the City Bank Farmers Trust Company, as Committee of the property of said incompetent, to pay an additional allowance of $25,000. annually, to your petitioner, MaBelle Houghton Plumb, and $25,000. annually to Ieuan Harris, as General Guardian of John H. Harris, William R. Harris, and David F. Harris, infants, out of the income received by said Committee, and that said additional allowances of $25,000. to said MaBelle Houghton Plumb and to said Ieuan Harris, as said General Guardian, be made re-
839 troactive for the past five years, payable out of the accumulated surplus income in the hands of the said Committee, viz., to your petitioner the sum of $125,000. and to said Ieuan Harris, as such General Guardian, the sum of $125,000.

I RECOMMEND that there be granted annually to MaBelle Houghton Plumb an allowance of $25,000. and to Ieuan Harris, as General Guardian, of John H. Harris, William R. Harris, and David F. Harris, infants, an allowance of $25,000. to be applied by him toward the maintenance and support of the said infants, said allowances
840 to be paid quarterly on the thirty-first days of March, June, September and December, in each year and to be in addition to allowances heretofore granted by Order of the Supreme Court, dated the 14th day of January, 1927, to the said MaBelle Houghton Plumb and Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, provided that after due provision having been made for the maintenance and care of the incompetent and the incompetent's property and any other proper charges against the income of the incompetent there be sufficient income remaining to pay the same, and if there be not sufficient income in any year

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that the balance of income for that year, after all necessary charges have been met, be divided equally between the said MaBelle Houghton Plumb and the said Ieuan Harris as General Guardian of the said infants, and

I RECOMMEND further that the said allowance of $25,000. per annum to MaBelle Houghton Plumb and to Ieuan Harris as General Guardian of John H. Harris, William R. Harris, and David F. Harris, infants be made retroactive for the last past five years and payable out of accumulated surplus income in the hands of the Committee of the property on December 31st, 1931, that is to say, that $25,000. be paid to the said MaBelle Houghton Plumb and to the said Ieuan Harris as General Guardian of the said infants for the year ending December 31st, 1931, $25,000. for the year ending December 31st, 1930, $25,000. for the year ending December 31st, 1929, $25,000. for the year ending December 31st, 1928, and $25,000. for the year ending December 31st, 1927. The total of said retroactive allowances to the said MaBelle Houghton Plumb to aggregate $125,000.00, and the total of said retroactive allowances to the said Ieuan Harris, as General Guardian of said infants, to aggregate $125,000.00 and

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I RECOMMEND further that the City Bank Farmers Trust Company as Committee of the said incompetent person, be instructed to pay to the said MaBelle Houghton Plumb the sum of $131,250.00, being $125,000. on account of retroactive allowances out of surplus accumulated income for the five years ending December 31st, 1931, and $6,250.00 being the quarterly installment due March 31st, 1932, of additional allowance herein recommended to be paid; and to pay to the said Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, the sum of $131,250.00, being

844 *Plaintiff's Exhibit 28.*

$125,000. on account of retroactive allowances out of surplus accumulated income for the five years ending December 31st, 1931, and $6,250.00 being the quarterly installment due March 31st, 1932, of additional allowances herein recommended to be paid.

Respectfully submitted,

TOWNSEND MORGAN
Referee

845 Dated, May 25th, 1932.

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Plaintiff's Exhibit 29.

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At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 31st day of May, 1932.

Present: HONORABLE PHOENIX INGRAHAM, Justice.

848

IN THE MATTER

of the

Application of MaBelle Houghton Plumb for an additional allowance to be paid to herself and others from the income received by the City Bank Farmers Trust Company, as Committee of the Property of

HELEN HALL VAIL,

an incompetent person

849

The parties hereto having stipulated that the title of the petition herein and the prayer of the petition should be amended, subject to the approval of the court, as set forth in the record herein and in the report of the referee, and that an Order to that effect should be entered without notice, and the court having approved of said amendments to said petition,

Now, on motion of Montgomery, Peabody & Grace, attorneys for the petitioner, it is

850 *Plaintiff's Exhibit 29.*

ORDERED that the title of the petition heretofore filed herein, and the prayer of said petition, be amended in accordance with said stipulation.

Enter

P I
J S C.

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851 No. 2887

State of New York }
County of New York } ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County,

DO HEREBY CERTIFY, That I have compared the preceding with the original Order on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

852 Filed, June 2, 1932.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

(Seal)

ARCHIBALD R. WATSON,
County Clerk and Clerk of the
Supreme Court, New York County.

Plaintiff's Exhibit 30. 853

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 3rd day of June, 1932.

Present: Honorable PHOENIX INGRAHAM Justice.

IN THE MATTER 854

of the

Application of MaBelle Houghton Plumb for an additional allowance to be paid to herself and others from the income received by the City Bank Farmers Trust Company, as Committee of the Property of

HELEN HALL VAIL,

an incompetent person.

ON READING and FILING the amended petition of MABELLE 855
HOUGHTON PLUMB praying for an additional yearly allowance of $25,000.00 for herself and for Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants and further praying that said allowance be made retroactive for five years and that said additional allowances for the past five years amounting to $25,000. each year be paid out of the accumulated surplus income in the possession of the said Committee, $125,000.00 to the petitioner and $125,000.00 to said Ieuan Harris as such Guardian, and

856 *Plaintiff's Exhibit 30.*

ON READING the answer of Cornelius J. Smyth, the Special Guardian duly appointed by this Court by an Order dated the 4th day of May, 1932, to protect the interests of the said incompetent, which said Order dispensed with service of all papers in this proceeding upon the incompetent, the answer of the City Bank Farmers Trust Company as Committee of the property of the incompetent Helen Hall Vail, by Taylor, Blanc, Capron & Marsh, its attorneys, and the Answer of Ieuan Harris as General Guardian of John H. Harris, William R. Harris and
857 David F. Harris, infants by Dean, King, Smith & Taylor, his attorneys, and an Order having been duly entered in this Court on the 4th day of May, 1932, appointing Townsend Morgan, Esquire, Referee to hear and take testimony of the respective parties and to report to this Court with his opinion with all convenient speed, and

ON READING the report of the said Referee dated the 25th day of May, 1932, heretofore duly filed herein, wherein he recommends that allowances be granted as prayed for, and

858 ON READING the report of the Special Guardian heretofore duly filed herein, and

ON READING the testimony taken at said Hearing from which it appears that there is accumulated income in the possession of the Committee of an inventoried value of $1,051,078.56, and whereas from the said testimony it appears that the income for the past five and one-half years has averaged about $395,000.00 a year, and the surplus income after paying all expenses, including allowances heretofore granted by the Order of January 14th, 1927, and paying all expenses, and etc. on account of the incompetent for her care and maintenance averaged about $191,105.18 a

Plaintiff's Exhibit 30.

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year, and it further appearing that said Helen Hall Vail is seventy-seven years of age and will not recover from the disease from which she is suffering and that her only issue is the petitioner, MaBelle Houghton Plumb and her son, Joseph H. Plumb, Jr., and the three infants, John H. Harris, William R. Harris and David F. Harris, children of a deceased daughter of the incompetent, and that said Helen Hall Vail has not made her Last Will and Testament, and that upon the death of the said incompetent the only persons entitled to share in her estate will be the said MaBelle Houghton Plumb the only surviving child of said incompetent and her son, Joseph H. Plumb, Jr., and the said John H. Harris, William R. Harris and David F. Harris the three children of a deceased daughter of said incompetent, or their issue, and this Court having found upon the evidence submitted before the said Referee and to this Court, that if the said incompetent, Helen Hall Vail, were in possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowances to such persons out of her property, and

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On reading the affidavit of John S. Montgomery, Esquire, a member of the firm of Montgomery, Peabody & Grace, the attorneys for the petitioner, and the affidavit of Cornelius J. Smyth, Esquire, Special Guardian of the incompetent, the affidavits of Townsend Morgan, Esquire, Referee, the affidavit of Frederick P. King, Esquire, a member of the firm of Dean, King, Smith & Taylor, the attorneys for Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, infants and the affidavits of Charles Angulo, Esquire, a member of the firm of Taylor, Blanc, Capron & Marsh, attorneys for the City Bank Farmers Trust Company as Committee

862 *Plaintiff's Exhibit 30.*

of the property of the incompetent, with respect to the services rendered by each of them in this proceeding, and no objection having been made except by the City Bank Farmers Trust Company as Committee of the Property, and

ON READING and FILING proof of service of the Notice of Settlement of this Order upon all the parties who have appeared herein,

863 NOW ON MOTION OF MONTGOMERY PEABODY & GRACE, attorneys for said petitioner, it is

ORDERED that the CITY BANK FARMERS TRUST COMPANY as Committee of the Property of Helen Hall Vail, an incompetent person pay out of the income received by it in each quarter, on the last day of the quarter, to wit: the last days of March, June, September and December in each year, in addition to the amounts paid by it under the Order of this Court dated the 14th day of January, 1927, provided that there be sufficient surplus income at the end of each quarter so to do, after deducting all other payments for that quarter, the following sums to the follow-
864 named persons—

To MABELLE HOUGHTON PLUMB, the petitioner, the daughter of said incompetent, the sum of SIX THOUSAND TWO HUNDRED AND FIFTY ($6,250.) DOLLARS;

To IEUAN HARRIS, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of SIX THOUSAND TWO HUNDRED AND FIFTY ($6,250.00) DOLLARS; and it is further

Plaintiff's Exhibit 30.

865

ORDERED that out of the surplus income now in its possession that the City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail an incompetent person pay

TO MABELLE HOUGHTON PLUMB, the petitioner, the sum of ONE HUNDRED AND THIRTY-ONE THOUSAND TWO HUNDRED AND FIFTY DOLLARS ($131,250.00) representing a payment of twenty-five Thousand Dollars ($25,000.) per annum, for the past five years, and of Six Thousand Two Hundred and Fifty Dollars ($6,250.), being the quarterly installment due March 31st, 1932, of additional allowances 866
as above ordered, and

TO IEUAN HARRIS as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of ONE HUNDRED AND THIRTY-ONE THOUSAND TWO HUNDRED AND FIFTY DOLLARS ($131,250.00), representing a payment of Twenty-five Thousand Dollars ($25,000.) per annum for the past five years, and of Six Thousand Two Hundred and Fifty Dollars ($6,250.) being the quarterly installment due March 31st, 1932, of additional allowances as above ordered, and it is further

867

ORDERED that the said City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail, an incompetent person, pay out of the income in its possession the following sums—

TO TOWNSEND MORGAN, ESQUIRE, the Referee, the sum of FIVE THOUSAND DOLLARS, as and for the allowance to which he is entitled, for his services herein;

TO CORNELIUS J. SMITH, ESQUIRE, the Special Guardian of the incompetent person, the sum of SIXTY FIVE HUNDRED DOLLARS as and for the allowance to which he is entitled, for his services herein;

868 *Plaintiff's Exhibit 30.*

To MONTGOMERY, PEABODY & GRACE, as attorneys for MaBelle Houghton Plumb, the petitioner, the sum of SIXTY FIVE HUNDRED DOLLARS as and for the allowance to which they are entitled, for their services herein, together with the sum of Two HUNDRED DOLLARS, to cover their disbursements herein;

To DEAN, KING, SMITH & TAYLOR, as attorneys for Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of TWENTY FIVE HUNDRED DOLLARS, as
869 and for the allowance to which they are entitled, for their services herein;

To TAYLOR, BLANC, CAPRON & MARSH, as attorneys for the City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail the incompetent, the sum of TWENTY FIVE HUNDRED DOLLARS, as and for the allowance to which they are entitled, for their services herein, and it is further

ORDERED that if upon the death of Helen Hall Vail the incompetent, it shall appear that the total allowances received by MaBelle Houghton Plumb, and the total ag-
870 gregate allowances received by the said three grandchildren, John H. Harris, William R. Harris and David F. Harris, or their guardian, Ieuan Harris for their account, shall not be equal to each other, that the excess received by either MaBelle Houghton Plumb, or the said three grandchildren, or their guardian, shall be considered as an advancement, and it is further

ORDERED that for the purpose of raising sufficient cash with which to make the payments hereinbefore directed to be made at this time, said City Bank Farmers Trust Company as Committee of the property as aforesaid, sell

Plaintiff's Exhibit 30.

871

forthwith the following securities, at the prices set opposite the same below, or better, and that it expend the net proceeds thereof in making said payment after having applied thereto any cash income now in its hands available for that purpose.

List of property to be sold by the Committee of the property of the Incompetent at the prices listed opposite the same or better.

$30,000. par value City of Cleveland, Ohio, Water Works 4½s due 12/1/36 @ 93

872

10,000. par value City of Kansas City, Missouri, Missouri River Bridge Gold Bonds, Series 21, 4¼s due 4/1/49 @ 92

20,000. par value registered City of Minneapolis permanent improvement 4s, due 9/1/46 @ 90

10,000. par value City of Mt. Vernon North Fourth Avenue widening 3¾s due 10/1/42 @ 81

30,000. par value City of Mt. Vernon North Fourth Avenue widening 3¾s due 10/1/43 @ 81

5,000. par value City of New Rochelle, New York, Municipal Improvement Bonds, Series of 1929 4¼s due 5/1/37 @ 91

873

5,000. par value of City of New Rochelle, New York, School Board, Series of 1929, 4¼s due 5/1/37 @ 91

12,000. City of New York Corp. Stock to provide for supply of water 4¼s due 3/1/64 @ 75

51,000. City of New York Corp. stock for construction of rapid transit railway 4¼s due 3/1/81 @ 75

874 *Plaintiff's Exhibit 30.*

18,000. City of Trenton, New Jersey, Series A 363 General Improvement Funding Bonds of 1929 4¼s due 2/1/39 @ 90

35,000. State of New Jersey State Highway Bd. Act. of 1927 Series A 4¼s due 7/1/44 @ 95

12,000. par value State of West Virginia Roads Series A 1931, 3½s due 6/1/50 @ 82

30,000. State of West Virginia Roads, Series A. 1931 3½s due 6/1/54 @ 82

875

And if the net proceeds of the foregoing should prove insufficient, then also, in so far as required to make up the deficiency the following—

$25,000. Cuyohoga County, Ohio, Jail and Court House Buildings, 4¼s due 4/1/45 @ 84

10,000. City of Newark, New Jersey, Port Newark Improvement 4¼s due 8/1/43 @ 86

1,000. City of Newark Market House, 4½s due 12/1/48 @ 84

876 16,000. County of Hudson, New Jersey Park Bonds 4s due 11/1/54 @ 72

4,000. County of Hudson, New Jersey Park Bonds 4s due 5/1/54 @ 72

Enter,

P. I.
J. S. C.

Plaintiff's Exhibit 30.

877

No. 2899.

State of New York,
County of New York, } ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County,

DO HEREBY CERTIFY, That I have compared the preceding with the original Order on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

878

Filed. June 3, 1932

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

ARCHIBALD R. WATSON
County Clerk and Clerk of the
Supreme Court, New York County.

879

880 **Plaintiff's Exhibit 31.**

SUPREME COURT:

NEW YORK COUNTY

REPORT OF SPECIAL GUARDIAN

IN THE MATTER

OF THE

881 Application of MABELLE HOUGHTON PLUMB for an allowance to be paid to herself and others from the unexpended surplus income now in the possession of the City Bank Farmers Trust Company, as Committee of the Property of

HELEN HALL VAIL,

an incompetent person.

I, CORNELIUS J. SMYTH, heretofore appointed by order of Honorable Phoenix Ingraham, one of the Justices of the Supreme Court of the State of New York, dated the
882 4th day of May, 1932, as Special Guardian of HELEN HALL VAIL, incompetent, hereby render my report as follows:

This proceeding is a petition by MABELLE HOUGHTON PLUMB, daughter of HELEN HALL VAIL, the incompetent herein, which petition sets forth that the incompetent was on August 11, 1926 adjudged to be incompetent, and that an order was entered by the Supreme Court of New York County on August 12, 1926, confirming the findings of the Sheriff's Jury; that the petitioner was appointed Committee of the Person of the incompetent, and the Farmers Loan & Trust Company (now the City Bank

Plaintiff's Exhibit 31.

Farmers Trust Company) was appointed Committee of the Property of the incompetent; that the incompetent is suffering from cerebral arterio sclerosis, with dementia, hallucinations and senile arterio-sclerotic chorea, and that her condition holds out no hope for recovery. 883

The said petition further sets forth that the incompetent is eighty (80) years of age and a widow; that she was married in 1878 to Charles F. Houghton, who died on March 30, 1896; that the incompetent re-married in the year 1902, marrying Charles Vail, who died in the year 1922; that the incompetent had three children, all by her first marriage, one of whom, Florence Houghton, died without issue, one of whom, Laura Houghton Harris, died leaving three children, John H. Harris, William R. Harris and David F. Harris, all infants, the third child being MaBelle Houghton Plumb, the petitioner; that one Ieuan Harris, is the father and General Guardian of the three infant children of Laura Houghton Harris. 884

The petition further sets forth that Charles F. Houghton devised his residuary estate in trust, and directed the trustee to apply the income to the use of the incompetent during her life, and upon her death, to divide the same into two equal parts, and to apply the income of one part to the use of his daughter Laura Houghton Harris during her life, and the income of the other part to the use of the petitioner during her life, with the further provision that upon the death of either of the said daughters, leaving issue her surviving, the part so held in trust for her should vest in her issue, share and share alike; that the petitioner has one child, Joseph H. Plumb, Junior, who is now nineteen (19) years of age, and that Laura Houghton Harris died August 31, 1925. 885

The petition also sets forth that the incompetent had been in the habit of contributing out of her income annually sums for the support of her two daughters, Laura

886 *Plaintiff's Exhibit 31.*

Houghton Harris and the petitioner; that the Committee, in its last annual inventory as of the 31st day of December, 1931, showed that it had in its possession principal amounting to $956,805.78 and accumulated income in the sum of $1,051;078.55; that the said $1,051,078.55 of income represents the total amount of accumulated surplus income since the date of the appointment of the Committee; that the income of the incompetent comes from two sources (1) the income from her estate held by the Committee, and (2) income from the estate of Charles F.
887 Houghton, deceased; that the total annual income received by the incompetent has been as follows:

For the year ending

December 31, 1926 (August 12th to December 31st)	$177,269.27
December 31, 1927	426,639.28
December 31, 1928	453,585.60
December 31, 1929	431,730.74
December 31, 1930	447,202.06
December 31, 1931	460,183.62

That the surplus income for the year 1931 was $241,096.24.

888 The petitioner prays for an order directing the Committee of the Property to pay out of the unexpended surplus accumulated income in the possession of the Committee to the petitioner the sum of Two Hundred Fifty Thousand Dollars ($250,000) and to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, the sum of Two Hundred Fifty Thousand Dollars ($250,000), and that such other and further relief may be granted to the petitioner as shall be deemed proper.

At the hearings before the Referee herein, it was shown that the petitioner receives an annual allowance from the

Plaintiff's Exhibit 31.

estate of the incompetent of Fifty Thousand Dollars ($50,000) and that Ieuan Harris receives as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, an annual allowance of Fifty Thousand Dollars ($50,000). That these allowances are paid to the petitioner and to Ieuan Harris, as General Guardian of the aforementioned infants, under an order of the Supreme Court of the State of New York, New York County, dated January 14, 1927. 889

After the testimony was given before the Referee at the hearings, the attorney for the petitioner asked leave to amend the petition, subject to the approval of this Honorable Court, so that the prayer of the petition would be that the Court allow an additional allowance of Twenty-five Thousand Dollars ($25,000) a year to the petitioner and an additional allowance of Twenty-five Thousand Dollars ($25,000) a year to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, and, further, that said allowances be made retroactive, to cover the years 1927, 1928, 1929, 1930 and 1931, so that there would be paid to the petitioner a back or retroactive allowance of One Hundred Twenty-five Thousand Dollars ($125,000) and there would be paid to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, a back or retroactive allowance of One Hundred Twenty-five Thousand Dollars ($125,000). 890 891

The proof submitted at the hearings shows briefly the following facts:

That Helen Hall Vail was on the 11th day of August, 1926, adjudged to be incompetent to manage herself and her affairs by a Sheriff's Jury of New York County, and that an order of the Supreme Court of New York County was entered on the 12th day of August, 1926, confirming in all respects the findings of the said Sheriff's Jury.

892 *Plaintiff's Exhibit 31.*

That the Farmers Loan and Trust Company (now City Bank Farmers Trust Company) was appointed Committee of the Property of the incompetent, and that the petitioner, MaBelle Houghton Plumb was appointed Committee of the Person of the incompetent.

That the incompetent is an inmate of Dr. MacDonald's House, at Central Valley, New York, and was admitted for observation there on September 16, 1926, and legally committed on December 10, 1926. That the incompetent is suffering from a form of mental disease, which is known
893 medically as psychosis or demetia with cerebral arterio sclerosis, characterized by confusion and delusion, and the incompetent is further suffering with a physical condition known as chorea, which is a convulsive state, and that her physical and mental condition have not improved since her admission to Dr. MacDonald's House; that age increases the physical and mental ailments of the incompetent, and her condition will become more accentuated as time goes on, and there is no hope of her recovery. The incompetent has no lucid or rational intervals, and she is not capable of judging of her estate and her means.

That the incompetent is between seventy-seven (77) and
894 eighty (80) years of age and her condition is not curable, but becomes progressively worse. That the incompetent occupies a suite at Dr. MacDonald's House, consisting of a bedroom, sitting room, bath and an additional sun room. That Dr. MacDonald's House is on an estate located at Central Valley, New York, which covers two hundred fifty (250) acres. The incompetent has two day nurses and a night nurse; that she has three doctors in attendance, and on every fair day she is taken for a trip around the country about Central Valley in an automobile, and she has every comfort, convenience and luxury which money can buy, and is denied nothing by her daughter, the Committee of the Person.

Plaintiff's Exhibit 31.

895

That no limit is put on the amount of money spent for the comfort of the incompetent and no recommendation by Dr. MacDonald's House for the expenditure of money for the comfort, convenience, physical or mental well being of the incompetent has ever been denied. That outside alienists were called in for consultation, who are specialists in mental diseases.

That the incompetent has a separate estate, the principal of which is now in the hands of the Committee of the Property and on December 31, 1931, amounted to Nine Hundred Fifty-four Thousand, Five Hundred Ninety-nine and 08/100 Dollars ($954,599.08). The Committee of the property receives for the account of the incompetent 896

1. Income from the property received on its appointment belonging to the incompetent;
2. Income from the trust fund created under the Will of Charles F. Houghton;
3. Income from the surplus income which has been invested from time to time since the appointment of the Committee of the Property.

For the period from the date of its appointment, August 12, 1926, to December 31, 1926, the Committee of the Property received as income $153,269.27, and had a balance of surplus income for said period, after making all payments, of $94,856.06. 897

For the year 1927, the Committee of the Property received as income for the account of the incompetent the sum of $426,639.28, and had a balance of surplus, after payments for personal maintenance, maintenance of real property, income taxes, Committee's commissions and allowances, of $148,023.73.

898 *Plaintiff's Exhibit 31.*

For the year 1928, the Committee of the Property received as income for the account of the incompetent the sum of $453,588.60, and had a balance of surplus, after payments for personal maintenance, maintenance of real property, income taxes, Committee's commissions and allowances, of $183,902.20.

For the year 1929, the Committee of the Property received as income for the account of the incompetent the sum of $431,749.49, and had a balance of surplus, after payments for personal maintenance, maintenance of real
899 property, income taxes, Committee's commissions and allowances, of $171,919.63.

For the year 1930, the Committee of the Property received as income for the account of the incompetent the sum of $447,202.05, and had a balance of surplus, after payments for personal maintenance, maintenance of real property, income taxes, Committee's commissions and allowances of $211,280.70.

For the year 1931, the Committee of the Property received as income for the account of the incompetent the sum of $460,183.62, and had a balance of surplus, after payments for personal maintenance, maintenance of real
900 property, income taxes, Committee's commissions and allowances, of $241,096.24.

That the accumulated surplus income in the possession of the Committee on December 31, 1931 was One Million, Fifty-one Thousand, Seventy-eight and 56/100 Dollars ($1,051,078.56) and has an actual market value as of the present time of Nine Hundred Seven Thousand, Two Hundred seventy-seven and 69/100 Dollars ($907,277.69).

That the principal of the incompetent's separate estate in the hands of the Committee has an estimated market value as of May 14, 1932, of Seven Hundred Thirty-Nine Thousand, One Hundred Dollars ($739,100), and this

Plaintiff's Exhibit 31.

figure does not take into consideration the contents of the house at Geneva, valued at $49,751.75, the contents of the house at Palm Beach, Florida, valued at $15,689.90, and jewelry valued at $67,418. Nor does this figure of $739,100 take into consideration the real estate at Geneva, New York, appraised at $45,275 and the real estate at Palm Beach, Florida, appraised at 196,274.25. 901

The principal of the separate estate of the incompetent is invested in bonds and mortgages. None of the bonds in the estate are in default, and none of the mortgages are in default, and the mortgages, with the exception of a purchase money mortgage covering property at Spring Lake, New Jersey, are legal investments for trustees in the State of New York. 902

The Charles F. Houghton Estate, of which the incompetent is the life beneficiary, has as its principal source of income, dividends on stock of the Corning Glass Company, the dividend on which was reduced from sixty-two and one-half cents (62½¢) a share to fifty-six and one-quarter cents (56¼¢) a share in 1932, which would decrease the income from the Charles F. Houghton Estate to the incompetent in the sum of $22,680. The incompetent receives from the Charles F. Houghton Estate approximately Three Hundred Sixteen Thousand Dollars ($316,000) a year, which represents proceeds of the dividends on common stock and approximately Sixty Thousand Dollars ($60,000) a year which is derived from investments legal for trustees in the State of New York. 903

In 1931, the payments made during the year out of income totalled $219,087.38 in items as follows:

Allowances pursuant to court order of January 14, 1927	$109,000.00
Personal maintenance of the incompetent	17,716.18
Maintenance of real property	21,111.31

904 *Plaintiff's Exhibit 31.*

Income taxes	65,603.05
Payments for accrued interest in the purchase of securities and miscellaneous expenses	5,656.84
making a total of	$219,087.38

and the amount of surplus income for the year 1931, as above stated was $241,096.24.

No will of the competent has ever been discovered
905 although careful search has been made.

The incompetent was married to Charles F. Houghton, who died on March 30, 1896, and thereafter she married, Charles Vail, who died in the year 1922. She had no children by her second husband.

The issue of the first marriage are, Florence Houghton, who died without issue; Laura Houghton Harris, who died leaving three children, John H. Harris, now sixteen years of age, William R. Harris, now fifteen years of age and David F. Harris, now twelve years of age, and MaBelle Houghton Plumb, your petitioner.

There are no other next of kin, and the parties for whom the allowance is prayed for in the petition in this
906 proceeding are the only ones who would inherit the estate if the incompetent were to die at the present time, and are the only ones interested in the estate as next of kin. The petitioner prays for an allowance which will be divided between the two branches of the family that will inherit equally. The parties who will receive the allowance prayed for in this petition are the parties who will eventually share equally in the estate of Charles F. Houghton on the termination of the life estate to the incompetent, HELEN HALL VAIL.

The will of Charles F. Houghton, deceased husband of the incompetent, devised his residuary estate in trust,

Plaintiff's Exhibit 31.

and directed the trustee to apply the income to the use of the incompetent during her life, and upon her death, to divide the same into two equal parts, and to apply the income of one part to his daughter, Laura Houghton Harris during her life, and the income of the other part to the petitioner, MaBelle Houghton Plumb, during her life, with a further provision that upon the death of either of the said daughters, leaving issue her surviving, the part so held in trust for her should vest in her issue, share and share alike. 907

If the incompetent died at the present time, one-half the estate of Charles F. Houghton would be divided among the three children of Laura Houghton Harris, hereinbefore named, and the income on the other half would go to the petitioner MaBelle Houghton Plumb for her life, and on her death, the principal of this half would vest in the son of MaBelle Houghton Plumb, Joseph H. Plumb, Jr. This son of the petitioner is preparing to enter college in the Fall, which will considerably increase her expenses. She has no source of income, except from the estate of the incompetent under an order of the Supreme Court, with the exception of a small income amounting to about One Hundred Fifty Dollars ($150) a year. She is forty-nine (49) years of age and her son is nineteen (19) years. The incompetent brought her up in luxurious surroundings, and when sane was most generous to her in the way of gifts and allowances, as well as to the deceased daughter, Laura Houghton Harris. 908 909

At one time, the incompetent gave the sum of Thirty Thousand Dollars ($30,000) to the petitioner to buy a house, and at another time a check for Ten Thousand Dollars ($10,000) when she started for Australia. The incompetent was always most affectionate with both her daughters and also with her four grandchildren. She sent her daughters to one of the most fashionable board-

910 *Plaintiff's Exhibit 31.*

ing schools around New York City. She sent her daughters on a trip around the world, which lasted for a year and one-half, and which included visits to Egypt, China and Japan. There were four in the party, and all expenses were borne by the incompetent. The incompetent was liberal in making allowances to her two daughters, treating them equally, first giving them Five Thousand Dollars ($5,000) a year and later Six Thousand Dollars ($6,000) a year. She made many presents of expensive jewelry to them and gifts of cash. The allowances
911 to the daughters were kept up by the incompetent despite the fact that they married, and the gifts continued to the daughters after their marriages, and although Mrs. Laura Houghton Harris was not dependent on her mother, the gifts to the petitioner were usually equalized in gifts to Mrs. Laura Houghton Harris.

The incompetent constantly visited her daughters and her grandchildren. She was cognizant of the fact that her daughter Mrs. Laura Houghton Harris was not dependent upon her at any time for support or financial aid, and knew that her married life was characterized with a great deal of luxury, travelling abroad, a large house and a number of servants. Notwithstanding this,
912 the allowance of Six Thousand Dollars ($6,000) a year was kept up to Laura Houghton Harris, and the incompetent gave this daughter a house assessed at about Twenty-seven Thousand Dollars ($27,000) as a present, roughly equalizing the gift of a house to the petitioner, MaBelle Houghton Plumb.

Allowances to relatives of an incompetent have been made upon the theory that the lunatic would in all probability have made such payments if he had been of sound mind. See Re Flatler, 248 N. Y. 415 (1928); Re Lord, 227 N. Y. 145.

Plaintiff's Exhibit 31.

913

In this proceeding, it is first to be noted that the petitioner is not a collateral relative who would not inherit, and who is not a next of kin of the incompetent, but the allowance is asked for a daughter and for grandchildren, who will share the estate of the incompetent upon her death, and who will share the estate of Charles F. Houghton on the death of the incompetent, who is the life beneficiary, and from which the bulk of the incompetent's income is derived.

The expense of maintaining the incompetent runs between Seventeen Thousand Dollars ($17,000) and Twenty-
914
five Thousand Dollars ($25,000) a year, and despite the present allowances under the court order of January 14, 1927, the incompetent has accumulated surplus income in the year 1931 amounting to $219,087.38, and over a period of five years has accumulated surplus income at the rate of approximately $200,000 a year, with a gross accumulation of $1,051,078.56 between the period August 12, 1926 and December 31, 1931.

In many cases allowances have been made to collateral relatives who would not share in the estate of an incompetent in case of her death. These cases are scrutinized carefully by the courts, and the courts are very strict in
915
making allowances to collateral relatives. The test seems to be in such cases, "What would the incompetent do herself if sane?". There is some question as to whether the court should look for the present motive of the incompetent, or what the ordinary reasonable person would do under the circumstances.

In either event, in this particular case, it would seem that the allowance should be made by the Court. There is much proof heretofore outlined of the generous and affectionate attitude of the incompetent toward her two daughters and her grandchildren. The incompetent herhelf made allowances and large gifts to them at a time

916 *Plaintiff's Exhibit 31.*

when her income was not as large as it is at the present time, and when the incompetent herself kept up large and luxurious homes, both in the country in the north, and in Palm Beach, in the South. There is also considerable evidence to the effect that the incompetent desired at all times to treat her two daughters equally, and to give gifts of money, jewelry and allowances to them, irrespective of their own personal and private means.

The cases where allowances have been refused have been to applicants for allowances, who were collateral
917 relatives and not next of kin, although in many of such instances, where the proof is clear and convincing that the incompetent would have made the allowance if sane, the courts have allowed the same. Matter of Henney, 2 Barb. Chanc. (N. Y.) 326; Re Flagler, 248 N. Y. 415; Matter of Flager, 126 Misc. 764.

In the Matter of Darling, L. R. 39 Ch. Div. 208 (1888), Lord Justice Bowen said, "The court has always considered that its jurisdiction to make allowances to collaterals ought to be exercised with the utmost jealousy. The case of successors to property depends upon a different principal".

918 In this proceeding, the petitioner and the parties to whom she prays an allowance are the successors to the property, and the next of kin, should the incompetent die at the present time, and the persons upon whom the enormous estate of Charles F. Houghton will devolve upon the death of the incompetent, who is the life beneficiary of that estate.

The Court is respectfully referred to a learned note to Matter of Flager, supra, in 59 A. L. R. 653, where the editor sets forth cases in reference to allowances to heirs, to collateral relatives and to strangers to the incompetent.

While the allowances herein asked for may seem large, it is to be borne in mind that the surplus income of the

Plaintiff's Exhibit 31.

919

incompetent is tremendous as mentioned previously, and the courts in the case of next of kin and successors have taken a more liberal view, taking into consideration the size of the estate, the station in life of the incompetent, and her successors, and it may well bear in mind the luxury in which the petitioner was brought up, the many evinced liberalities of the incompetent to her daughters, and her evident desire that gifts should be equalized between the two branches of the family represented on the one hand by her daughter, the petitioner, MaBelle Houghton Plumb, and on the other hand, the children of the deceased daughter, who are represented by Ieuan Harris as their guardian.

920

The Special Guardian therefore does not object under the circumstances and proof deduced to the allowances requested in the amended petition.

Respectfully submitted,

CORNELIUS J. SMYTH
Special Guardian of Helen Hall Vail,
Incompetent.

921

922 *Plaintiff's Exhibit 31.*

No. 2867

State of New York }
County of New York } ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, DO HEREBY CERTIFY, That I have compared the preceding with the original Report of Special Guardian on file in my office, and that the same is a correct transcript therefrom, and of
923 the whole of such original.

Filed. May 23, 1940.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

ARCHIBALD R. WATSON
County Clerk and Clerk of the Supreme Court,
(Seal) New York County.

924

Plaintiff's Exhibit 32. 925

SUPREME COURT:

COUNTY OF NEW YORK

ACCOUNT

In the Matter

of the

Intermediate Judicial Settlement of the Account of Proceedings of CITY BANK FARMERS TRUST COMPANY, as Committee of the Property of 926

HELEN HALL VAIL,

an Incompetent Person.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

City Bank Farmers Trust Company, Committee of the property of the above named Helen Hall Vail, an incompetent person, hereby renders the following intermediate judicial account of its proceedings as such Committee from the date of its appointment August 12, 1926 to and including April 1, 1933. 927

The petitioner was known as Farmers' Loan & Trust Company of the City of New York, and assumed its present name on the 28th day of June, 1929.

The petitioner, under its name of Farmers' Loan & Trust Company of the City of New York, was duly appointed Committee of the property of the above named Helen Hall Vail by an order of this Court dated the 12th day of August, 1926, and duly entered in the Office of the Clerk of the County of New York on the 13th day of August, 1926.

928 *Plaintiff's Exhibit 32.*

The petitioner has not given a bond as such Committee. That by an Order of this Court dated the 12th day of August, 1926, the incompetent's daughter, MaBelle Houghton Plumb, was duly appointed Committee of the Person of the said incompetent, which said Order directed the said MaBelle Houghton Plumb, as Committee of the Person of the incompetent, and your petitioner, as Committee of the property of said incompetent, to provide for the said incompetent and see that she is properly cared for in a manner suitable to her means and social
929 position.

That since its appointment as Committee of the property of said incompetent, your petitioner has, in each of the years 1927 to 1933 inclusive, filed in the Office of the Clerk of the County of New York, as required by statute, an annual inventory and account of its proceedings as such Committee for the preceding year, and from time to time such annual inventories and accounts have been examined by referee appointed by the presiding justice of the Appellate Division of this Court to examine the inventories and accounts of the committees of incompetent persons.

930 The incompetent is entitled to the income arising from a trust fund created for her benefit under the will of her former husband Charles F. Houghton, deceased.

That by an order of this Court dated the 14th day of January, 1927, and duly entered in the Office of the Clerk of the County of New York on the same day, your petitioner, as Committee of the property of the said incompetent, was directed to pay out of the income of the said incompetent each year in equal quarterly payments the following sums to the following named persons:

To MaBelle Houghton Plumb, a daughter of the said incompetent the sum of Fifty Thousand Dollars ($50,000).

To Ieuan Harris, General Guardian of John H. Harris,

Plaintiff's Exhibit 32.

William R. Harris and David F. Harris, granchildren of the incompetent, the sum of Fifty Thousand Dollars ($50,000). 931

To Edward Hageman Hall, a brother of the incompetent, the sum of Two Thousand Dollars ($2,000).

To Mary Hall Taft, a sister of the incompetent, the sum of Three Thousand Dollars ($3,000).

To Elizabeth Hall Burdick, a sister of the incompetent, the sum of Two Thousand Dollars ($2,000).

To Abbe Ferrin, a sister of the incompetent, the sum of Two Thousand Dollars ($2,000).

To Lucy Hall Ferris, a sister of the incompetent, the sum of Two Thousand Dollars ($2,000). 932

That by an order of this Court dated the third day of June, 1932, and duly entered in the Office of the Clerk of the County of New York on the same day, your petitioner, as Committee of the property of said incompetent, was directed to pay to said MaBelle Houghton Plumb, in addition to the annual allowance hereinabove referred to, the sum of Six Thousand Two Hundred and Fifty Dollars ($6,250) quarterly and to said Ieuan Harris, as General Guardian of said John H. Harris, William R. Harris and David F. Harris, in addition to the annual allowance hereinabove referred to, the sum of Six Thousand Two Hundred and Fifty Dollars ($6,250) quarterly. 933 Said order further directed your petitioner to pay to said MaBelle Houghton Plumb and to said Ieuan Harris, as General Guardian as aforesaid, the sum of One Hundred Thirty-One Thousand Two Hundred and Fifty Dollars ($131,259) each, representing a payment of Twenty-Five Thousand Dollars ($25,000) per annum for the past five years and of Six Thousand Two Hundred and Fifty Dollars ($6,250), the quarterly installment due March 31, 1932 of additional allowances as ordered by said order. That pursuant to said order this Court dated January 14,

934 *Plaintiff's Exhibit 32.*

1927, and said order of this Court dated June 3, 1932, said allowances and additional allowances are now being paid by your petitioner, except the allowances to said Elizabeth Hall Burdick, who died on March 25, 1933, and Abbe Ferrin, who died on September 6, 1927.

That the incompetent owns real estate consisting of a residence and grounds situated at Geneva, County of Ontario, in the State of New York, and a winter residence situated at Palm Beach, County of Palm Beach, in the State of Florida. That your petitioner, as such Commit-
935 tee, has been required to expend large sums for the maintenance and upkeep of said parcels of real estate, as well as for the taxes and other charges thereon. That your petitioner in this account seeks the approval of the Court as to all expenditures heretofore made in and about the maintenance and upkeep of said parcels of real estate, and also prays that the Court will fix an annual sum for the future maintenance and upkeep of said parcels of real estate which may be expended by your petitioner for such purposes.

SCHEDULE "A" hereto attached contains a full and true statement and description of each article or item of real
936 or personal property and the value thereof, and each sum of money, either principal or interest of Helen Hall Vail, incompetent, which were received by the Committee on its appointment.

SCHEDULE "A-1" hereto attached contains a statement showing the increase of principal since the appointment of Committee from sales of securities, personal property and from other sources.

SCHEDULE "A-2" hereto attached contains a statement showing increase of the principal by reason of sales of real estate and from other sources affecting real estate.

Plaintiff's Exhibit 32.

937

SCHEDULE "B" hereto attached contains a statement of all sums received on the sale of real and personal property in the principal account and from other sources.

SCHEDULE "B-1" hereto attached contains a statement of all investments made of the principal fund.

SCHEDULE "B-2" hereto attached contains a statement of the purchases of real estate for the principal fund.

SCHEDULE "B-3" hereto attached contains a statement of all changes of investments made, redeemed or paid off 938
affecting the principal account.

SCHEDULE "C" hereto attached contains a statement of expenses of administration chargeable to Principal Account.

SCHEDULE "D" hereto attached contains a statement of all receipts of income not including rent.

SCHEDULE "D-1" hereto attached contains a statement of all income received from real estate.

SCHEDULE "D-2" hereto attached contains a statement 939
showing gains or losses realized on sales of securities purchased for the income account.

SCHEDULE "E" hereto attached contains a statement of all investments made by Committee for account of income of said estate.

SCHEDULE "E-1" hereto attached contains a statement of all investments sold or paid off on account of income.

SCHEDULE "F" hereto attached contains a statement of all expenses of administration chargeable to income.

940 *Plaintiff's Exhibit 32.*

SCHEDULE "F-1" hereto attached contains a statement of disbursements properly chargeable to income incurred in the maintenance of the incompetent person.

SCHEDULE "F-2" hereto attached contains a statement of expenses of administration chargeable against real estate.

SCHEDULE "F-3" hereto attached contains a statement of payments made to beneficiaries chargeable to income, pursuant to order of the Supreme Court.

941

SCHEDULE "F-4" hereto attached contains a statement showing amounts transferred from Income Account for amortization on various bonds.

SCHEDULE "G" hereto attached contains a statement of the condition of the fund on the date of this accounting showing the book value of the various securities purchased by the Committee as corrected by amortization.

SCHEDULE "H" hereto attached contains a statement of the names and places of residence of the next of kin of the said incompetent person.

942

SUMMARY

AS TO PRINCIPAL

The committee charges itself as follows:—

With amount of Schedule "A"	$ 864,228.90
With amount of Schedule "A-1"	362,674.58
With amount of Schedule "A-2"	39,571.00
Total	$1,266,474.48

Plaintiff's Exhibit 32. 943

The committee credits itself as follows:—

With amount of Schedule "B-2"	4,075.00	
With amount of Schedule "C"	35,120.33	39,195.33
Leaving a balance of principal of		$1,227,279.15

As to Income

The committee charges itself as follows:—

With amount of Schedule "D"	$2,886,630.13
With amount of Schedule "D-1"	8,430.10
Total	$2,895,060.23

944

The committee credits itself as follows:—

With amount of Schedule "D-2"	$30,084.44	
With amount of Schedule "F"	660,703.84	
With amount of Schedule "F-1"	121,376.78	
With amount of Schedule "F-2"	175,954.32	
With amount of Schedule "F-3"	993,116.67	
With amount of Schedule "F-4"	177.61	1,981,413.66
Leaving a balance of income of		$ 913,646.57

945

Said Schedules are severally signed on behalf of the Committee of the Property of the Incompetent and form part of this account.

City Bank Farmers Trust Company
as Committee of the Property

By: H. S. Butterweck.
Trust Officer.

April, 1, 1933.

946 *Plaintiff's Exhibit 32.*

SCHEDULE "F-3"

Containing a statement of payment made to beneficiaries chargeable to income, pursuant to orders of the Supreme Court.

1927		Voucher	No.
Mar. 31	Mary Hall Taft	$ 750.00	956
	Elizabeth Hall Burdick	500.00	957
	Abbe Ferrin	500.00	958
	Lucy Hall Ferris	500.00	959
	MaBelle Houghton Plumb	12,500.00	960
947	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	961
	Edward Hageman Hall	500.00	962
July 2	Elizabeth Hall Burdick	500.00	963
	Lucy Hall Ferris	500.00	964
	MaBelle Houghton Plumb	12,500.00	965
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	966
	Edward Hageman Hall	500.00	967
	Mary Hall Taft	750.00	968
	Abbe Ferrin	500.00	968A
948 Sept. 30	Mabelle Houghton Plumb	12,500.00	969
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	970
	Edward Hageman Hall	500.00	971
	Mary Hall Taft	750.00	972
	Elizabeth Hall Burdick	500.00	973
	Lucy Hall Ferris	500.00	974
Oct. 21	New Rochelle Trust Co., Executor estate Abbe Hall Ferrin, being amount of quarterly payment accrued to Sept 6, 1927, date of death	366.67	975

Plaintiff's Exhibit 32.

949

1928		Voucher	No.
Jan. 3	Mabelle Houghton Plumb...	12,500.00	976
	Ieuan Harris as General Guardian of John H. Harris, Willian R. Harris and David F. Harris	12,500.00	977
	Edward Hageman Hall	500.00	978
	Mary Hall Tafe	750.00	979
	Elizabeth Hall Burdick	500.00	980
	Lucy Hall Ferris	500.00	981
Mar. 30	MaBelle Houghton Plumb....	12,500.00	982
	Ieuan Harris as General Guardian of John H. Harris, Willian R. Harris and David F. Harris	12,500.00	983
	Edward Hageman Hall	500.00	984
	Mary Hall Taft	750.00	985
	Elizabeth Hall Burdick	500.00	986
	Lucy Hall Ferris	500.00	987
		$137,616.67	

950

1928	Brought Forward	$137,616.67	
June 29	MaBelle Houghton Plumb ..	12,500.00	988
	Ieuan Harris as General Guardian of John H. Harris, Willian R. Harris and David F. Harris	12,500.00	989
	Edward Hageman Hall	500.00	990
	Mary Hall Taft	750.00	991
	Elizabeth Hall Burdick	500.00	992
	Lucy Hall Ferris	500.00	993
Sept. 29	Mabelle Houghton Plumb....	12,500.00	994
	Ieuan Harris as General Guardian of John H. Harris, Willian R. Harris and David F. Harris	12,500.00	995
	Edward Hageman Hall	500.00	996
	Mary Hall Taft	750.00	997
	Elizabeth Hall Burdick	500.00	998
	Lucy Hall Ferris	500.00	999

951

952 *Plaintiff's Exhibit 32.*

1928		Voucher	No.
Dec. 31	MaBelle Houghton Plumb...	12,500.00	1000
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1001
	Edward Hageman Hall	500.00	1002
	Elizabeth Hall Burdick	500.00	1003
	Mary Hall Taft	750.00	1004
	Lucy Hall Ferris	500.00	1005
1929			
953			
Mar. 30	Mabelle Houghton Plumb....	12,500.00	1006
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1007
	Edward Hageman Hall	500.00	1008
	Mary Hall Taft	750.00	1009
	Elizabeth Hall Burdick	500.00	1010
	Lucy Hall Ferris	500.00	1011
June 29	MaBelle Houghton Plumb...	12,500.00	1012
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and		
954	David F. Harris	12,500.00	1013
	Edward Hageman Hall	500.00	1014
	Mary Hall Taft	750.00	1015
	Elizabeth Hall Burdick	500.00	1016
	Lucy Hall Ferris	500.00	1017
Sept. 30	MaBelle Houghton Plumb...	12,500.00	1018
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1019
	Edward Hageman Hall	500.00	1020
	Mary Hall Taft	750.00	1021
	Elizabeth Hall Burdick	500.00	1022
	Lucy Hall Ferris	500.00	1023

Plaintiff's Exhibit 32.

955

1929			Voucher	No.
Dec. 31	MaBelle Houghton Plumb...		12,500.00	1024
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris		12,500.00	1025
	Edward Hageman Hall		500.00	1026
	Mary Hall Taft		750.00	1027
	Elizabeth Hall Burdick		500.00	1028
	Lucy Hall Ferris		500.00	1029
			$328,366.67	

956

1930			
	Brought Forward	$328,366.67	
Mar. 30	MaBelle Houghton Plumb...	12,500.00	1030
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1031
	Edward Hageman Hall	500.00	1032
	Mary Hall Taft	750.00	1033
	Elizabeth Hall Burdick	500.00	1034
	Lucy Hall Ferris	500.00	1035
June 30	MaBelle Houghton Plumb...	12,500.00	1036
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1037
	Edward Hageman Hall	500.00	1038
	Mary Hall Taft	750.00	1039
	Elizabeth Hall Burdick	500.00	1040
	Lucy Hall Ferris	500.00	1041
Sept. 30	MaBelle Houghton Plumb ...	12,500.00	1042
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1043
	Edward Hageman Hall	500.00	1044
	Mary Hall Taft	750.00	1045
	Elizabeth Hall Burdick	500.00	1046
	Lucy Hall Ferris	500.00	1047

957

958 *Plaintiff's Exhibit 32.*

			Voucher	No.
1930				
	Dec. 31	MaBelle Houghton Plumb...	12,500.00	1048
		Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1049
		Edward Hageman Hall	500.00	1050
		Mary Hall Taft	750.00	1051
		Elizabeth Hall Burdick	500.00	1052
		Lucy Hall Ferris	500.00	1053
1931				
959	Mar. 31	MaBelle Houghton Plumb...	12,500.00	1054
		Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1055
		Edward Hageman Hall	500.00	1056
		Mary Hall Taft	750.00	1057
		Elizabeth Hall Burdick	500.00	1058
		Lucy Hall Ferris	500.00	1059
	June 30	MaBelle Houghton Plumb...	12,500.00	1060
		Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1061
		Edward Hageman Hall	500.00	1062
960		Mary Hall Taft	750.00	1063
		Elizabeth Hall Burdick	500.00	1064
		Lucy Hall Ferris	500.00	1065
	Sept. 30	MaBelle Houghton Plumb...	12,500.00	1066
		Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1067
		Edward Hageman Hall	500.00	1068
		Mary Hall Taft	750.00	1069
		Elizabeth Hall Burdick	500.00	1070
		Lucy Hall Ferris	500.00	1071
			$519,116.67	

Plaintiff's Exhibit 32.

961

1931	Brought Forward	$519,116.67		
		Voucher	No.	
Dec. 31	MaBelle Houghton Plumb....	12,500.00	1072	
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1073	
	Edward Hageman Hall	500.00	1074	
	Mary Hall Taft	750.00	1075	
	Elizabeth Hall Burdick	500.00	1076	
	Lucy Hall Ferris	500.00	1077	
1932				962
Mar. 31	MaBelle Houghton Plumb...	12,500.00	1078	
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	12,500.00	1079	
	Edward Hageman Hall	500.00	1080	
	Mary Hall Taft	750.00	1081	
	Lucy Hall Ferris	500.00	1082	
Apr. 2	Elizabeth Hall Burdick	500.00	1083	
June 21	MaBelle Houghton Plumb pursuant to order of Supreme Court, New York County, dated June 3, 1932	131,250.00	1084	
22	Ieuan Harris as General Guardian of John H. Harris William R. Harris and David F. Harris a/c of $131,250. due pursuant to order of Supreme Court, New York County, dated June 3, 1932	95,000.00	1085	963
30	Lucy Hall Ferris	500.00	1086	
	Mary Hall Taft	750.00	1087	
	Edward Hageman Hall	500.00	1088	
July 1	MaBelle Houghton Plumb, a/c of $12,500. due June 30, 1932 pursuant to order of Supreme Court, New York County, dated January 14, 1927	8,385.00	1089	

964 *Plaintiff's Exhibit 32.*

			Voucher	No.
	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, a/c of $12,500. due June 30, 1932 pursuant to order of Supreme Court		8,385.00	1090
965	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, pursuant to order of Supreme Court, New York County, dated June 3, 1932, balance of $131,250		36,250.00	1091
28	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, balance due on payment of June 30, 1932	4,115.00		
966	Additional allowance per Court Order dated June 3, 1932	6,250.00	10,365.00	1092
	Mabelle Houghton Plumb, balance due on payment of June 30, 1932.	4,115.00		
	Additional allowance per Court Order dated June 3, 1932	6,250.00	10,365.00	1093

Plaintiff's Exhibit 32. 967

		Voucher	No.	
ept. 30	MaBelle Houghton Plumb....	18,750.00	1094	
30	Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris	18,750.00	1095	
		$912,866.67		
1932	Brought Forward	$912,866.67		
ept. 30	Edward Hageman Hall	500.00	1096	
	Lucy Hall Ferris	500.00	1097	968
	Mary Hall Taft	750.00	1098	
ec. 31	Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris	18,750.00	1099	
	MaBelle Houghton Plumb...	18,750.00	1100	
	Edward Hageman Hall	500.00	1101	
	Mary Hall Taft	750.00	1102	
	Lucy Hall Ferris	500.00	1103	
1933				
ar. 31	Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris	18,750.00	1104	969
	MaBelle Houghton Plumb...	18,750.00	1105	
	Edward Hageman Hall	500.00	1106	
	Mary Hall Taft	750.00	1107	
	Lucy Hall Ferris	500.00	1108	
		$993,116.67		

CITY BANK FARMERS TRUST COMPANY
as Committee of the Property

By: H. S. BUTTERWECK
Trust Officer.

970 **Plaintiff's Exhibit 33.**

SUPREME COURT:

COUNTY OF NEW YORK

SUPPLEMENTAL ACCOUNT OF PROCEEDINGS FROM
April 1, 1933 to July 1, 1933

In the Matter

of the

971 Intermediate Judicial Settlement of the Account of Proceedings of CITY BANK FARMERS TRUST COMPANY, as Committee of the Property of

HELEN HALL VAIL,

an Incompetent Person.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

City Bank Farmers Trust Company, Committee of the property of the above named Helen Hall Vail, an in-
972 competent person, hereby renders the following supplemental account of its proceedings as such Committee from the 1st day of April, 1933 to the 1st day of July, 1933:

SUPPLEMENTAL SCHEDULE "A-1" hereto attached contains a statement showing the increase of principal since the date of its account from sales of securities, personal property and from other sources.

SUPPLEMENTAL SCHEDULE "B" hereto attached contains a statement of all sums received on the sale of real and personal property in the principal account and from other sources, since the date of its account.

Plaintiff's Exhibit 33.

973

SUPPLEMENTAL SCHEDULE "B-3" hereto attached contains a statement of all changes of investments made, redeemed or paid off affecting the principal account, since the date of its account.

SUPPLEMENTAL SCHEDULE "D" hereto attached contains a statement of all receipts of income not including rent, since the date of its account.

SUPPLEMENTAL SCHEDULE "F" hereto attached contains a statement of all expenses of administration chargeable to income, since the date of its account.

974

SUPPLEMENTAL SCHEDULE "F-1" hereto attached contains a statement of disbursements properly chargeable to income incurred in the maintenance of the incompetent person, since the date of its account.

SUPPLEMENTAL SCHEDULE "F-2" hereto attached contains a statement of expenses of administration chargeable against real estate, since the date of its account.

SUPPLEMENTAL SCHEDULE "F-3" hereto attached contains a statement of payments made to beneficiaries chargeable to income, pursuant to orders of the Supreme Court.

975

SUPPLEMENTAL SCHEDULE "G" hereto attached contains a statement of the condition of the fund on the date of this accounting, July 1, 1933.

976 *Plaintiff's Exhibit 33.*

The following is a summary statement of this supplemental account:

As to Principal

The committee charges itself as follows:

With amount of Schedule "A"		$ 864,228.90
With amount of Schedule "A-1"		362,674.58
977 With amount of Supplemental Schedule "A-1"		285.00
With amount of Schedule "A-2"		39,571.00
Total		1,266,759.48

The committee credits itself as follows:

With amount of Schedule "B-2"	$4,075.00	
With amount of Schedule "C"	35,120.33	39,195.33
Leaving a balance of principal of		$1,227,564.15

978

As to Income

The committee charges itself as follows:

With amount of Schedule "D"	$2,386,630.13
With amount of Supplemental Schedule "D"	46,775.67
With amount of Schedule "D-1"	8,430.10
Total	$2,941,835.90

Plaintiff's Exhibit 33.

979

Brought forward		$2,941,835.90
The committee credits itself as follows:		
With amount of Schedule "D-2"	$30,084.44	
With amount of Schedule "F"	660,703.84	
With amount of Supplemental Schedule "F"	55,998.24	
With amount of Schedule "F-1"	121,376.78	
With amount of Supplemental Schedule "F-1"	3,992.05	980
With amount of Schedule "F-2"	175,954.32	
With amount of Supplemental Schedule "F-2"	4,283.83	
With amount of Schedule "F-3"	993,116.67	
With amount of Supplemental Schedule "F-3"	1,750.00	
With amount of Schedule "F-4"	177.61	
		2,047,437.78 981
Leaving a balance of income of		$ 894,398.12

Said Supplemental Schedules are severally signed on behalf of the Committee of the Property of the Incompetent and form part of this account.

CITY BANK FARMERS TRUST COMPANY
as Committee of the Property

By C. REGINALD OATES
Trust Officer.

July 1, 1933.

982 *Plaintiff's Exhibit 33.*

SUPPLEMENTAL SCHEDULE "F-3."

Containing a statement of payments made to beneficiaries chargeable to income, pursuant to orders of the Supreme Court.

1933		Voucher.	No.
June 30	Edward Hagemann Hall	$ 500.00	S-39
30	Lucy Hall Ferris	500.00	S-40
983 30	Mary Hall Taft	750.00	S-41
		$1,750.00	

CITY BANK FARMERS TRUST COMPANY
as Committee of the Property

By C. REGINALD OATES
Trust Officer.

984

Plaintiff's Exhibit 35.

985

At a Special Term of the Supreme Court, Part 1, thereof, held in and for the County of New York in the Court House in the Borough of Manhattan, City of New York, on the 19th day of February, 1934.

resent: Hon. ALFRED FRANKENTHALER, Justice.

JUDGEMENT

986

In the Matter

of the

ntermediate Judicial Settlement of the Account of Proceedings of CITY BANK FARMERS TRUST COMPANY, as Committee of the Property of

HELEN HALL VAIL,

an Incompetent Person.

987

The above named City Bank Farmers Trust Company aving heretofore presented to this Court its petition in is matter, duly verified the 25th day of April, 1933, raying leave to be allowed to render and file its Interediate Judicial Account as Committee of the Property f the above named Helen Hall Vail, an incompetent perm, from the time of its appointment as such committee order of this Court dated the 12th day of August, 1926, and including the 1st day of April, 1933; and this ourt having by an order dated the 9th day of May, 33, permitted the petitioner to render and file its said ntermediate Judicial Account, and having thereby apointed John A. Mullen, Esq., Special Guardian of the

988 *Plaintiff's Exhibit 35.*

said incompetent person for the protection of her rights and interests in this proceeding, and having also provided that notice of the filing of said account and of the petitioner's application for the judicial settlement thereof, and for the appointment of a Referee to take and state the same, should be given to the next of kin of said incompetent person named in said order personally or by mailing copies of such notice, and also to MaBelle Houghton Plumb, as Committee of the Person of said incompetent, as by reference to said order will more particularly
989 appear; and said order having designated J. Rhodes O'Reilly, Esq., as a person to be served with notice of the filing of the said account and of the application for the judicial settlement thereof, and for the appointment of a Referee to take and state the said account in behalf of all the infants herein; and said order having dispensed with the service of such notice and application upon the said incompetent; and said petitioner having thereafter, in pursuance of said order last mentioned, filed its Intermediate Judicial Account of its proceedings from the date of its appointment, as aforesaid, to and including the 1st day of April, 1933, in the office of the Clerk of the County of New York, and having also given due notice of the
990 filing thereof and of its said application to all the parties in interest herein, as provided in said order dated May 9th, 1933; and the petitioner having duly asked leave of this Court to file a Supplemental Account of its proceedings from the 1st day of April, 1933 to the 1st day of July, 1933, and for the appointment of a Referee to take and state the Intermediate Judicial Account and Supplemental Account of the petitioner and to report to the Court his opinion thereon as to all matter embraced in said account and supplemental account; and this Court by an order dated the 3rd day of August, 1933, having granted permission to the said petitioner to file a Supple-

mental Account of its proceedings, as aforesaid, and having appointed J. Rhodes O'Reilly, Esq., as Referee, as aforesaid; and this Court having by its three orders, each dated the 22nd day of June, 1933, appointed Frederick P. King, Esq., Special Guardian of the infants John H. Harris, William R. Harris, David F. Harris and Joseph H. Plumb, Jr., for the purpose of protecting their rights and interest in this proceeding; and the petitioner having duly filed its Supplemental Account in the office of the Clerk of the County of New York on the 11th day of August, 1933, and the said Special Guardians, John A. Mullen, Esq., and Frederick P. King, Esq., having duly qualified as such, and the said Referee having given due notice of the hearing in this proceeding to be held before him on the 3rd day of November, 1933, at 10 o'clock A. M., and having examined the witnesses presented by the parties hereto, and having taken and stated the account and supplemental account of said petitioner; and the said Frederick P. King, Esq., as such Special Guardian, having reserved the right to file objections to said account and said supplemental account, and the said Referee having fixed the 8th day of December, 1933 as the day upon which the right to file objections to the account and supplemental account should expire, and no objections having been filed to said account and supplemental account, and the said Referee having duly made his report as such Referee, dated the 16th day of January, 1934 and said report having been duly filed in the office of the Clerk of the County of New York; and a copy of said report having been duly served upon said John A. Mullen, Esq., and Frederick P. King, Esq., Special Guardians, as aforesaid, with notice of the filing thereof; and no exceptions having been filed to said report, as shown by the certificate of the Clerk of said Court, filed herewith; and notice of this motion having been duly served upon John A. Mullen, Esq.,

991

992

993

994 *Plaintiff's Exhibit 35.*

Special Guardian of said incompetent person, and upon Frederick P. King, Esq., Special Guardian of said infants;

NOW, on the said report of said Referee and all the papers and proceedings heretofore filed and had herein, and on reading and filing said notice of motion, with proof of the due service thereof, as aforesaid, the affidavit of John A. Mullen, Esq., verified the 13th day of February, 1934, the affidavit of Frederick P. King, Esq., verified the 25th day of January, 1934, the affidavit of Thomas T.
995 Grace, Esq., verified the 13th day of February, 1934, and the affidavit of J. Rhodes O'Reilly, Esq., the Referee herein, verified the 9th day of February, 1934, and after hearing John S. Montgomery, Esq., of counsel for the petitioner, John A. Mullen, Esq., the Special Guardian of said incompetent person, and Frederick P. King, Esq., the Special Guardian of the infants herein, and on motion of Montgomery, Peabody, Grace & Derby, Esqs., attorneys for the petitioner, it is

ORDERED, ADJUDGED AND DECREED, as follows:

1. That the said report of said Referee be and the same
996 hereby is in all respects ratified and confirmed.

2. That the payments made by the petitioner as Committee of the Property of said incompetent, as set forth in said account and supplemental account, and also the retention by the petitioner of its commissions as Committee on monies received and paid out by it as stated in said account and supplemental account, are hereby all approved, ratified and confirmed.

3. That the investments made by the petitioner as Committee of the Property of said incompetent person, as shown by said account and supplemental account, are all

Plaintiff's Exhibit 35.

997

hereby ratified and approved as proper to be made by it, and they are also all of them approved as proper for it to retain as such Committee.

4. That the said account and supplemental account of said Committee filed herein, as aforesaid, respectively duly verified on its behalf on the 2nd day of June, 1933 and the 7th day of August, 1933, contain a true, just, proper and correct statement and account of all its acts and proceedings as such Committee from the date of its appointment to the 1st day of July, 1933, and a correct and true itemized statement of the receipts and disbursements of any and all monies and properties that have come into the hands of said Committee covering the whole of said period, or with which the Committee is chargeable; that said account and supplemental account are correct in all respects and that said account and supplemental account are hereby judicially approved, settled, adjusted, determined and fixed in all respects as made and filed herein.

998

The following is a Summary Statement of the Account and Supplemental Account:

As to Principal

999

The Committee is charged as follows:

With amount of Schedule "A" (Account) as corrected by testimony in the hearing	$ 869,354.65
With amount of Schedule "A-1" (Account)	362,674.58
With amount of Schedule "A-1" (Supplemental Account)	285.00
With amount of Schedule "A-2" (Account)	39,571.00
Total	$1,271,885.23

1000 *Plaintiff's Exhibit 35.*

The Committee is credited as follows:

With amount of Schedule "B-2" (Account)	4,075.00	
With amount of Schedule "C" (Account)	35,120.33	39,195.33
Leaving a balance of principal of (Supplemental Account)		$1,232,689.90

1001

As to Income

The Committee is charged as follows.

With amount of Schedule "D" (Account)	$2,886,630.13
With amount of Schedule "D" (Supplemental Account)	46,775.67
With amount of Schedule "D-1" (Account)	8,430.10
Total	$2,941,835.90

The Committee is credited as follows:

1002

With amount of Schedule "D-2" (Account)	30,084.44	
With amount of Schedule "F" (Account)	660,703.84	
With amount of Schedule "F" (Supplemental Account)	55,998.24	
With amount of Schedule "F-1" (Account)	121,376.78	
With amount of Schedule "F-1" (Supplemental Account)	3,992.05	

Plaintiff's Exhibit 35.

1003

With amount of Schedule "F-2" (Account)	175,954.32	
With amount of Schedule "F-2" (Supplemental Account)	4,283.83	
With amount of Schedule "F-3" (Account)	993,116.67	
With amount of Schedule "F-3" (Supplemental Account)	1,750.00	
With amount of Schedule "F-4" (Account)	177.61	2,047,437.78
Leaving a balance of income of (Supplemental Account)		$ 894,398.12

1004

5. There is hereby allowed to the petitioner as Committee, as aforesaid, the sum of $12,656.88, as and for the one-half commission which it is entitled to for receiving the capital, and it is allowed as one-half commission for paying out of principal the sum of $35,122.30, the sum of $398.40, which said sums the petitioner as such Committee is hereby authorized to pay to itself out of the capital of said estate, and the said Committee is hereby authorized to retain and pay to itself out of the income of said estate the sum of $4,430.37, being the balance of commissions, at the statutory rate, for receiving and paying out the income received and paid by it from the date of its appointment to the 1st day of July, 1933.

1005

6. That there is hereby allowed to the petitioner as Committee, as aforesaid, the sum of $925.06, for the costs and disbursements of its said attorneys, as stated in the said affidavit of Thomas T. Grace, Esq.

Plaintiff's Exhibit 35.

1006

7. The petitioner is hereby ordered and directed to pay out of the income of the estate of said incompetent, to J. Rhodes O'Reilly, Esq., the sum of $10,000.00, as and for the reasonable fee and compensation of said J. Rhodes O'Reilly, as Referee in this proceeding: to John A. Mullen, Esq., the sum of $8,500.00, as and for his reasonable fee and compensation herein as Special Guardian of the incompetent, and to Frederick P. King, Esq., the sum of $11,100., as and for his disbursements, reasonable fee and compensation as Special Guardian for the infant persons in this proceeding.

1007 On making the said payments, the said petitioner, City Bank Farmers Trust Company, the Committee of the Property of said Helen Hall Vail, an incompetent person, is hereby released and forever discharged from any and all liability, responsibility and accountability to said incompetent person, or to her estate, or to her next of kin, or any of them by reason of the acts and doings of said Committee down to and including the 1st day of July, 1933.

Enter

A. F.

1008 J. S. C.

Plaintiff's Exhibit 35. 1009

No. 2878.

State of New York }
County of New York } ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, DO HEREBY CERTIFY, That I have compared the preceding with the original Judgment on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original. 1010

Filed. February 20, 1934.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

(Seal)

ARCHIBALD R. WATSON
County Clerk and Clerk of the Supreme Court,
New York County.

1011

1012 **Plaintiff's Exhibit 36.**

SUPREME COURT:

COUNTY OF NEW YORK

ACCOUNT

IN THE MATTER

of the

1013 Final Judicial Settlement of the Account of Proceedings of CITY BANK FARMERS TRUST COMPANY, as Committee of the Property of

HELEN HALL VAIL,

an Incompetent Person.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

City Bank Farmers Trust Company, Committee of the property of the above named Helen Hall Vail, formerly an incompetent person, hereby renders the following final
1014 judicial account of its proceedings as such Committee from July 1st, 1933 to and including December 27, 1935, the date of the death of said incompetent.

The petitioner was known as Farmers' Loan & Trust Company of the City of New York, and assumed its present name on the 28th day of June, 1929.

The petitioner, under its name of Farmers' Loan & Trust Company of the City of New York, was duly appointed Committee of the property of the above named Helen Hall Vail by an order of this Court dated the 12th day of August, 1926, and duly entered in the Office of the Clerk of the County of New York on the 13th day of August, 1926.

Plaintiff's Exhibit 36.

1015

The petitioner has not given a bond as such Committee. That by an Order of this Court dated the 12th day of August, 1926, the incompetent's daughter, MaBelle Houghton Plumb, was duly appointed Committee of the Person of the said incompetent, which said Order directed the said MaBelle Houghton Plumb, as Committee of the Person of the incompetent, and your petitioner, as Committee of the property of said incompetent, to provide for the said incompetent and see that she was properly cared for in a manner suitable to her means and social position.

That since its appointment as Committee of the property 1016
of said incompetent, your petitioner has, in each of the years 1927 to 1934 inclusive, filed in the Office of the Clerk of the County of New York, as required by statute, an annual inventory and account of its proceedings as such Committee for the preceding year, and from time to time such annual inventories and accounts have been examined by referee appointed by the presiding justice of the Appellate Division of this Court to examine the inventories and accounts of the committees of incompetent persons.

That on or about the 19th day of February, 1934, by a final judgment of this Court, the account of your petitioner from August 12, 1926, the day of its appointment, 1017
down to and including the 30th day of June, 1933 was judicially settled and allowed and fixing and adjusting the balance of principal remaining in its hands at $1,232,689.90 and the balance of income at $894,398.12, and said judgment further authorized and directed the Committee to make certain disbursements and expenditures therein set forth.

That the said incompetent, Helen Hall Vail, died on the 27th of December, 1935, intestate, and that City Bank Farmers Trust Company was, by a decree of the Surrogate's Court of Ontario County dated February 10, 1936, duly appointed Administrator of the goods, chattels and credits of the said decedent.

1018 *Plaintiff's Exhibit 36.*

That by an order of this Court dated the 14th day of January, 1927, and duly entered in the Office of the Clerk of the County of New York on the same day, your petitioner, as Committee of the property of the said incompetent, was directed to pay out of the income of the said incompetent each year in equal quarterly payments the following sums to the following named persons:

To MaBelle Houghton Plumb, a daughter of said incompetent the sum of Fifty Thousand Dollars ($50,000).

To Ieuan Harris, General Guardian of John H. Harris,
1019 William R. Harris and David F. Harris, grandchildren of the incompetent, the sum of Fifty Thousand Dollars ($50,000.00).

To Edward Hageman Hall, a brother of the incompetent, the sum of Two Thousand Dollars ($2,000.00).

To Mary Hall Taft, a sister of the incompetent, the sum of Three Thousand Dollars ($3,000.00).

To Elizabeth Hall Burdick, a sister of the incompetent, the sum of Two Thousand Dollars ($2,000.00).

To Abbe Ferrin, a sister of the incompetent, the sum of Two Thousand Dollars ($2,000.00).

To Luch Hali Ferris, a sister of the incompetent, the
1020 sum of Two Thousand Dollars ($2,000.00).

That by an order of this Court dated the third day of June, 1932, and duly entered in the Office of the Clerk of the County of New York on the same day, your petitioner, as Committee of the property of said incompetent, was directed to pay to said MaBelle Houghton Plumb, in addition to the annual allowance hereinabove referred to, the sum of Six Thousand Two Hundred and Fifty Dollars ($6,250.00) quarterly and to said Ieuan Harris, as General Guardian of said John H. Harris, William R. Harris and David F. Harris, in addition to the annual allowance hereinabove referred to, the sum of Six Thousand Two Hundred and Fifty Dollars ($6,250) quarterly.

Plaintiff's Exhibit 36.

Said order further directed your petitioner to pay to said MaBelle Houghton Plumb and to said Ieuan Harris, as General Guardian as aforesaid, the sum of One Hundred Thirty-one Thousand Two Hundred and Fifty Dollars ($131,250.00) each, representing a payment of Twenty-five Thousand Dollars ($25,000.00) per annum for the past five years and of Six Thousand Two Hundred and Fifty Dollars ($6,250.00), the quarterly installment due March 31, 1932, of additional allowances as ordered by said order. That pursuant to said order of this Court dated January 14, 1927, and said order of this Court dated June 3, 1932, said allowances and additional allowances are now being paid by your petitioner, except the allowances to said Elizabeth Hall Burdick, who died on March 25, 1933, and Abbe Ferrin, who died on September 6, 1927.

That the incompetent at the time of her death owned real estate consisting of a residence and grounds situated at Geneva, County of Ontario, in the State of New York, and a winter residence situated at Palm Beach, County of Palm Beach, in the State of Florida.

SCHEDULE "A" hereto attached contains a statement of the assets constituting the fund on July 1, 1933, as settled by a judgment of the Supreme Court dated February 19, 1934.

SCHEDULE "A-1" hereto attached contains a statement of all securities belonging to Principal Account, which were sold, and the gain and loss realized therefrom.

SCHEDULE "A-2" hereto attached contains a statement of all sums received on the sale of real and personal property in the Principal Account and from other sources.

SCHEDULE "A-3" hereto attached contains a statement of real property sold belonging to the Principal Account and the gain and loss realized therefrom.

1024 *Plaintiff's Exhibit 36.*

SCHEDULE "A-4" hereto attached contains a statement of personal property delivered to a distributee.

SCHEDULE "B" hereto attached contains a statement of investments made for the Principal Account.

SCHEDULE "B-1" hereto attached contains a statement of expenses of administration chargeable to Principal Account.

1025 SCHEDULE "C" hereto attached contains a statement of changes in securities in Principal Account by reason of exchanges, stock dividends and additions.

SCHEDULE "D" hereto attached contains a statement of all sums received on the sale of real and personal property in the Income Account and from other sources.

SCHEDULE "D-1" hereto attached contains a statement of changes in securities in Income Account by reason of exchanges, stock dividends and additions.

SCHEDULE "D-2" hereto attached contains a statement
1026 of securities received for Income Account to refund unpaid interest on bonds.

SCHEDULE "D-3" hereto attached contains a statement of all securities belonging to the Income Account, which were sold or redeemed, and the gain or loss realized therefrom.

SCHEDULE "E" hereto attached contains a statement of all investments made by Committee for Account of Income.

Plaintiff's Exhibit 36.

1027

SCHEDULE "E-1" hereto attached contains a statement of the net decrease resulting from revaluation of securities as of December 27, 1935.

SCHEDULE "F" hereto attached contains a statement of all receipts of income not including rent.

SCHEDULE "G" hereto attached contains a statment of payments made to the beneficiaries chargeable to Income, pursuant to Orders of the Supreme Court.

SCHEDULE "G-1" hereto attached contains a statement 1028
of disbursements properly chargeable to Income, incurred in the maintenance of the incompetent person.

SCHEDULE "G-2" hereto attached contains a statement of disbursements properly chargeable to Income.

SCHEDULE "G-3" hereto attached contains a statement of commissions on income paid to the Committee.

SCHEDULE "H" hereto attached contains a statement of the personal property belonging to Principal and Income Account with its market value as of December 27, 1935 1029
delivered to the City Bank Farmers Trust Company, as Administrator of the goods, chattels and credits of Helen Hall Vail.

SCHEDULE "H-1" hereto attached contains a statement of the real property that passed to the distributees by reason of the death of Helen Hall Vail.

SCHEDULE "I" hereto attached contains a statement of the names and places of residence of the next of kin of said Helen Hall Vail, the deceased incompetent.

1030 *Plaintiff's Exhibit 36.*

SUMMARY

AS TO PRINCIPAL

The Committee charges itself as follows:—

With amount of Schedule "A"	$1,227,564.15
With amount of Schedule "A-1"	4,977.64
With amount of Schedule "A-2"	729.40
Total	$1,233,271.19

1031

The Committee credits itself as follows:—

With amount of Schedule "A-3"	$ 8,500.00	
With amount of Schedule "A-4"	3,850.00	
With amount of Schedule "B-1"	15,535.86	
With amount of Schedule "E-1"	184,361.29	
With amount of Schedule "H"	912,194.91	
With amount of Schedule "H-1"	109,250.00	
	$1,233,692 06	
Less cash deficit	420.87	1,233,271.19

1032

AS TO INCOME

The Committee charges itself as follows:—

With amount of Schedule "A"	894,398.12
With amount of Schedule "F"	1,186,093.53
With amount of Schedule "D-2"	6,673.79
Total	$2,087,165.44

Plaintiff's Exhibit 36.

1033

The Committee credits itself as follows:—

With amount of Schedule "D-3"	$ 1,728.48	
With amount of Schedule "E-1"	4,117.05	
With amount of Schedule "G"..	384,750.00	
With amount of Schedule "G-1"	38,807.64	
With amount of Schedule "G-2"	407,668.13	
With amount of Schedule "G-3"	15,666.48	
With amount of Schedule "H"..	1,136,767.27	1,989,505.05
Balance—cash		$ 97,660.39

1034

Said Schedules are severally signed on behalf of the Committee of the Property of the Incompetent and form part of this account.

CITY BANK FARMERS TRUST COMPANY,
as Committee of the Property.

By S. R. WALKER
Trust Officer

April 27, 1936.

1035

1036 *Plaintiff's Exhibit 36.*

SCHEDULE "G".

A STATEMENT of payments made to the beneficiaries chargeable to Income, pursuant to Orders of the Supreme Court.

1933			
July	1	Paid MaBelle Houghton Plumb ..	$ 18,750.00
		" Ieuan Harris, general guardian of John H., William R. and David F. Harris	18,750.00
1037 Oct.	2	As of September 30, 1933 paid Mabelle Houghton Plumb	18,750.00
		As of September 30, 1933 paid Ieuan Harris, general guardian of John H., William R. and David F. Harris	18,750.00
		Paid Mary Hall Taft	750.00
		" Edward Hagemann Hall	500.00
		" Lucy Hall Ferris	500.00
Dec.	30	" Lucy Hall Ferris	500.00
		" Edward Hagemann Hall	500.00
1038		" Ieuan Harris, general guardian of John H., William R. and David F. Harris	18,750.00
		" MaBelle Houghton Plumb ..	18,750.00
1934			
Mar.	31	" Edward Hagemann Hall	500.00
		" Lucy Hall Ferris	500.00
		" Ieuan Harris, general guardian of John H., William R. and David F. Harris, per decree of Supreme Court 1/14/27	18,750.00
		" MaBelle Houghton Plumb ..	18,750.00

Plaintiff's Exhibit 36.

1039

1934			
June 30	"	Lucy Hall Ferris	500.00
	"	Edward Hagemann Hall	500.00
	"	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
	"	Mabelle Houghton Plumb ...	18,750.00
Sept. 29	"	Edward Hagemann Hall ...	500.00
	"	Lucy Hall Ferris	500.00
	"	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
	"	MaBelle Houghton Plumb ...	18,750.00
Dec. 31	"	Lucy Hall Ferris	500.00
	"	Edward Hagemann Hall	500.00
	"	MaBelle Houghton Plumb ...	18,750.00
	"	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
1935			
Mar. 30	"	Lucy Hall Ferris	500.00
	"	Edward Hagemann Hall	500.00
	"	MaBelle Houghton Plumb ...	18,750.00
	"	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
June 29	"	Lucy Hall Ferris	500.00
	"	Edward Hagemann Hall	500.00
	"	MaBelle Houghton Plumb ...	18,750.00
	"	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00

1040

1041

Plaintiff's Exhibit 36.

Sept. 30	"	Lucy Hall Ferris	500.00
	"	Edward Hagemann Hall	500.00
	"	MaBelle Houghton Plumb ...	18,750.00
	"	Ieuan Harris, General Guardian of John H., William R. and David F. Harris	18,750.00
			$384,750.00

CITY BANK FARMERS TRUST COMPANY
as Committee of the Property

By S. R. WALKER
Trust Officer

Plaintiff's Exhibit 37. 1045

At a Special Term of the Supreme Court, Part I thereof, held in and for the County of New York in the Court House in the Borough of Manhattan, City of New York, on the 9th day of December, 1936.

ent: Hon. Louis A. Valente, Justice.

In the Matter 1046

of the

l Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company, as Committee of the Property of

Helen Hall Vail,

an Incompetent Person.

---

e above named City Bank Farmers Trust Company ng heretofore presented to this court its petition in 1047 matter, duly verified the 18th day of February, 1936, ing leave to be allowed to render and file its final unt as Committee of the Property of the above named n Hall Vail, an incompetent person, from the 1st day ıly, 1933, the date of the intermediate account of said mittee, to the 27th day of December, 1935, the date e incompetent's death; and this Court having by an r dated the 30th day of June, 1936, permitted the ioner to render and file its said final account, and ng also provided that notice of the filing of said ac- t and of the petitioner's application for the judicial

1048 *Plaintiff's Exhibit 37.*

settlement thereof, and for the appointment of a referee to take and state the same, should be given to the distributees of said incompetent person named in said order personally or by mailing copies of such notice as by reference to said order will more particularly appear; and said petitioner having thereafter, in pursaunce of said order last mentioned, filed its final account of its proceedings from the date of its intermediate account, as aforesaid, to and including the 27th day of December, 1935, in the office of the Clerk of the County of New
1049 York, and having also given due notice of the filing thereof and of its said application to all the parties in interest herein, as provided in said order dated June 30, 1936; and the petitioner having duly petitioned this court for the appointment of a referee to take and state the final account of the petitioner and to report to the court his opinion thereon as to all matters embraced in said account; and this Court, by an order dated the 17th day of July, 1936, having appointed Albert A. Friedlander, Esq., as Referee, as aforesaid; and this Court having by its order dated the 30th day of June, 1936, appointed Frederick P. King, Esq., Special Guardian of the infants
1050 John H. Harris, William R. Harris and David F. Harris, for the purpose of protecting their rights and interests in this proceeding; and the said Special Guardian, Frederick P. King, Esq., having duly qualified as such, and the said John H. Harris, having become twenty one years of age on the 25th day of July, 1936, and having appeared in this proceeding by Messrs. Dean, King, Smith & Taylor, his attorneys, and the said Referee having given due notice of the hearing in this proceeding to be held before him on the 23rd day of July, 1936, at 2: o'clock P. M., and having examined the witnesses presented by the parties hereto, and having taken and stated the account of said petitioner, and the schedules and

Plaintiff's Exhibit 37.

1051

summary of said account having been amended to comply with the testimony taken at the hearings; and the said Frederick P. King, Esq., as such Special Guardian, and all other parties to this proceeding having stipulated to waive the fixation by the referee of any time to file objections to the account and the service of written notice of the same; and said Special Guardian having filed his report; and no objections having been filed to said account, and the said Referee having duly made his report as such Referee, dated the 20th day of November, 1936, and said report having been duly filed in the office of the 1052
Clerk of the County of New York, and a copy of said report having been duly served upon said Frederick P. King, Esq., Special Guardian, as aforesaid, and upon Messrs. Dean, King, Smith & Taylor, attorneys for MaBelle Houghton Plumb and John H. Harris, with notice of the filing thereof; and no exceptions having been filed to said report, and notice of this motion having been duly served upon Frederick P. King, Esq., Special Guardian of said infants, and upon Dean, King, Smith & Taylor, as attorneys for MaBelle Houghton Plumb and John H. Harris;

NOW, on the said report of said Referee and all the 1053
papers and proceedings heretofore filed and had herein, and on reading and filing said notice of motion, with proof of the due service thereof, as aforesaid, the affidavit of Frederick P. King, Esq., verified the 24th day of November, 1936, the affidavit of Thomas T. Grace, Esq., verified the 20th day of November, 1936, and the affidavit of Albert A. Friedlander, Esq., the Referee herein, verified the 20th day of November, 1936, and after hearing Thomas T. Grace, Esq., of counsel for the petitioner, Frederick P. King, Esq., the Special Guardian of the infants herein, and Frederick P. King, Esq., of the firm of Dean, King, Smith & Taylor, attorneys for MaBelle

Plaintiff's Exhibit 37.

1054

Houghton Plumb and John H. Harris, and on motion of Montgomery, Peabody, Grace & Derby, Esqs., attorneys for the petitioner, it is

ORDERED, ADJUDGED AND DECREED, as follows:

1. That the said report of said Referee be and the same hereby is in all respects ratified and confirmed.

2. That the payments made by the petitioner as Committee of the Property of said incompetent, as set forth
1055 in said account, and also the retention by the petitioner of its commissions as Committee on moneys received and paid out by it as stated in said account are hereby all approved, ratified and confirmed.

3. That the investments made by the petitioner as Committee of the Property of said incompetent person, as shown by said account are all hereby ratified and approved as proper to be made by it.

4. That the said account of said Committee filed herein, as aforesaid, verified on its behalf on the 23rd day of
1056 June, 1936, as amended, contains a true, just, proper and correct statement and account of all its acts and proceedings as such committee from the date of its preliminary accounting to the 27th day of December, 1935, and a correct and true itemized statement of the receipts and disbursements of any and all moneys and properties that have come into the hands of said Committee covering the whole of said period, or with which the Committee is chargeable; that said account as amended is correct in all respects and that said account as amended is hereby judicially approved, settled, adjusted, determined and fixed in all respects as made and filed herein.

Plaintiff's Exhibit 37. 1057

The following is a Summary Statement of the account, as amended in accordance with the testimony taken at the hearings and with the report of the Referee:

SUMMARY

AS CORRECTED BY TESTIMONY

As to Principal

The Committee charges itself as follows:		
With amount of Schedule "A"		$1,020,725.75
With amount of Schedule "A-1"		4,977.64 1058
With amount of Schedule "A-2"		729.40
		$1,026,432.79
The Committee credits itself as follows:		
With amount of Schedule "A-3"	$ 8,500.00	
With amount of Schedule "A-4"	3,850.00	
With amount of Schedule "B-1"	15,535.86	
With amount of Schedule "E-1"	54,222.14	
With amount of Schedule "H"	910,745.66	
With amount of Schedule "H-1"	34,000.00	
	$1,026,853.66	1059
Less cash deficit	420.87	$1,026,432.79

As to Income

The Committee charges itself as follows:	
With amount of Schedule "A"	$ 894,398.12
With amount of Schedule "F"	1,186,369.29
With amount of Schedule "D-2"	6,673.79
Total	$2,087,441.20

1060 *Plaintiff's Exhibit 37.*

The Committee credits itself as follows:

With amount of Schedule "D-3"	$ 1,728.48	
With amount of Schedule "E-1"	4,117.05	
With amount of Schedule "G"	384,750.00	
With amount of Schedule "G-1"	38,807.64	
With amount of Schedule "G-2"	407,668.13	
With amount of Schedule "G-3"	15,666.48	
With amount of Schedule "H"	1,136,767.27	1,989,505.05
		$ 97,936.15

1061

5. There is hereby allowed to the petitioner as Committee, as aforesaid, the sum of $9,599.90 as and for the one-half commission which it is entitled to for paying out the capital, which said sum the petitioner as such Committee is hereby authorized to pay to itself out of the capital of said estate, and the said Committee is hereby authorized to retain and pay to itself out of the income of said Estate $21438.40 being one-half commission at the statutory rate for paying out the income received and paid by it to the Administrator of the Estate, as shown by Schedule "H".

1062

6. That there is hereby allowed to the petitioner as Committee, as aforesaid, the sum of $655.57, for the costs and disbursements of its said attorneys, as stated in the said affidavit of Thomas T. Grace, Esq., and the further sum of $15,000.00 as and for an allowance to the Committee for its reasonable counsel fee and disbursements in this proceeding.

7. The petitioner is hereby ordered and directed to pay to Albert A. Friedlander, Esq., the sum of $10,000.00 as

Plaintiff's Exhibit 37.

1063

and for the reasonable fee and compensation of said Albert A. Friedlander as Referee in this proceeding; and to Frederick P. King, Esq., the sum of $7,500.00 as and for his disbursements, reasonable fee and compensation as Special Guardian for the infant persons in this proceeding, and to Dean, King, Smith & Taylor the sum of $7,500.00 as and for their reasonable fee and compensation as attorneys for MaBelle Houghton Plumb and John H. Harris.

On making the said payments, the said petitioner, City Bank Farmers Trust Company, the Committee of the 1064
Property of said Helen Hall Vail, an incompetent person, is hereby directed to pay over the balance thereof, to wit, $26,242.28 to City Bank Farmers Trust Company as Administrator of the goods, chattels and credits of Helen Hall Vail, deceased, and upon so doing said City Bank Farmers Trust Company as Committee of the property of Helen Hall Vail, an incompetent person, is hereby released and forever discharged from any and all liability, responsibility and accountability to the estate of said incompetent person, or to her distributees, or any of them by reason of the acts and doings of said Committee, and it is hereby directed that the bond of MaBelle Houghton 1065
Plumb, the Committee of the Person of said incompetent person, be cancelled.

Enter

L A V
J. S. C.

1066 *Plaintiff's Exhibit 37.*

No. 2864

State of New York }
County of New York } ss.:

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, DO HEREBY CERTIFY, That I have compared the preceding with the original Final Order on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

1067

Filed. December 9, 1936.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 23 day of May, 1940.

ARCHIBALD R. WATSON
County Clerk and Clerk of the Supreme Court,
(Seal) New York County.

1068

Plaintiff's Exhibit 38.

1069

Schedule E of Federal Estate Tax Return Transfers (Omitting Printed Instructions).

(1) Did the decedent make any transfer described in the above first paragraph (including the six subparagraphs)? (Answer "Yes" or "No.") No

(2) Did the decedent, within 2 years immediately preceding his death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") 1070
Yes

(3) Did the decedent, at any time, make a transfer of an amount of $5,000 or more without an adequate and full consideration in money or money's worth, but not believed to be includible in the gross estate as indicated in the above first paragraph (including the six subparagraphs)? (Answer "Yes" or "No.") Yes

(4) If the answer to question (3) is "Yes" state date, amount or value, character of transfer, and motive which actuated the decedent in making the transfer: See explanation in Sch. E next page 1071

(5) Were there in existence at the time of the decedent's death any trusts created by him during his lifetime? (Answer "Yes" or "No.") No

Pursuant to application of MaBelle Houghton Plumb, decedent's daughter, the Supreme Court, New York County, made an order dated Jan. 14, 1927, authorizing and directing City Bank Farmers Trust Company (then known as Farmers' Loan and Trust Company), as the duly appointed and acting Committee of the property of the decedent who was at that time an incompetent person, to pay out of the unexpended income of the decedent

1072 *Plaintiff's Exhibit 38.*

(then incompetent), the following sums annually: To MaBelle Houghton Plumb, daughter $50,000; To Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, grandchildren $50,000; To Edward Hageman Hall, brother $2,000; To Mary Hall Taft, sister $3,000; To Elizabeth Hall Burdick, sister $2,000; To Abee Ferrin, sister $2,000; To Lucy Hall Ferrin, sister $2,000.

Pursuant to a further application made by said MaBelle Houghton Plumb, the Supreme Court, New York County,
1073 made an order dated June 3, 1932, granting additional allowances out of the unexpended income of the decedent (then incompetent) to be paid by said City Bank Farmers Trust Company, as Committee. Said increases were made retroactive for a period of five years, and increased the allowances to said MaBelle Houghton Plumb and the Guardian for the infant grandchildren to the extent of $25,000 per annum each. The total amount of all allowances out of the incompetent's income paid under the said orders of January 14, 1927 and June 3, 1932 is $1,377,866.67.

True copies of said orders are attached to this return.

1074 The foregoing allowances made by the Court have been characterized by the Appellate Division as "gifts" and are, therefore, not taxable as transfers or advancements. (See *Matter of Farmers' Loan & Trust Company*, 181 App. Div. 642.)

The Administrator during the time when it was acting as Committee for decedent, who was an incompetent, filed Gift Tax returns in respect to all the above payments made since the effective date of the Gift Tax Act of 1932, and paid the gift taxes thereon, pursuant to a ruling that such payments constitute gifts within the Gift Tax Law.

Plaintiff's Exhibit 38. 1075

Schedule L of Federal Estate Tax Return.

RECAPITULATION

Schedule	*Gross Estate*	*Value*	
A	Real estate	$ 109,260.00	
B	Stocks and bonds (grand total of all pages of this schedule)	1,612,666.00	
C-1	Mortgages, notes, and cash	507,662.65	
C-2	Insurance		
D-1	Jointly owned property		1076
D-2	Other miscellaneous property	162,573.83	
E	Transfers		
F	Powers of appointment		
G	Property previously taxed		
	Total gross estate	$2,392,162.48	

Schedule	*Deductions*	*Amount*	
H	Funeral expenses	$ 1,122.27	
	Administration expenses:		
	Executors' commissions estimated	46,300.00	1077
	Attorneys' fees, estimated	57,500.00	
	Miscellaneous	3,237.67	
I	Debts of decedent	371,712.15	
J-1	Unpaid mortgages		
J-2	Net losses during administration		
	Support of dependents		
K	Charitable, public, and similar gifts and bequests		
	TOTAL DEDUCTIONS, except specific exemption and property previously taxed	$ 479,872.09	

1078 *Plaintiff's Exhibit 38.*

Schedule M of Federal Estate Tax Return.

NET ESTATE FOR TAX IMPOSED BY REVENUE ACT OF 1926—RESIDENT OR CITIZEN

Instructions—This schedule should be used only for the estate of a resident or citizen of the United States, except that if death occurred prior to the enactment of the Revenue Act of 1934 it should not be used for the estate of a nonresident citizen of the United States.

1. Total gross estate.....		$2,392,162.48
1079 2. Total deductions, except specific exemption and property previously taxed.....$479,872.09		
3. Specific exemption	100,000.00	
4. Total deductions, except property previously taxed (item 2 plus item 3).....	579,872.09	
5. Deduction for property previously taxed without proportionate reduction (Schedule G, item c).....		
1080 6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1).....		
7. Net deduction for property previously taxed (item 5 minus item 6).....	000.00	
8. Total deductions (item 4 plus item 7)		579,872.09
9. Net estate (item 1 minus item 8)		$1,812,290.39

Estate of HELEN HALL VAIL.

Date of death, December 27, 1935.

Plaintiff's Exhibit 38. 1081

Schedule N of Federal Estate Tax Return.

NET ESTATE FOR ADDITIONAL TAX IMPOSED BY REVENUE ACT OF 1932—RESIDENT OR CITIZEN

Instructions.—This schedule should be used only for the estate of a resident or citizen of the United States, except that if death occurred prior to the enactment of the Revenue Act of 1934 it should not be used for the estate of a nonresident citizen of the United States.

1. Total gross estate.....		$2,392,162.48	1082
2. Total deductions, except specific exemption and property previously taxed.....	$479,872.09		
3. Specific exemption	40,000.00		
4. Total deductions, except property previously taxed (item 2 plus item 3).....	$519,872.09		
5. Deduction for property previously taxed without proportionate reduction (Schedule G, item e).....			1083
6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1)			
7. Net deduction for property previously taxed (item 5 minus item 6).....			
8. Total deductions (item 4 plus item 7)		519,872.09	
9. Net estate (item 1 minus item 8)		$1,872,290.39	

1084 *Plaintiff's Exhibit 38.*

COMPUTATION OF TAX OF FEDERAL TAX RETURN

1. Gross tax imposed by 1926 act	$116,606.14	
2. Credit for gift tax imposed by 1924 and/or 1932 act.....	0.00	
3. Gross tax less credit for gift tax (1 minus 2).....	$116,606.14	
4. Credit for estate, inheritance, legacy, or succession tax....	93,284.91	
1085 5. Net tax imposed by 1926 act (3 minus 4)		$ 23,321.23
6. Total gross taxes imposed by 1926 and 1932 acts (Tentative Tax, 1932 Act).....	$512,901.64	
7. Gross tax imposed by 1926 act.	116,606.14	
8. Gross additional tax (6 minus 7)	$396,295.50	
9. Credit for gift tax imposed by 1932 act	0.00	
1086 10. Net additional tax (8 minus 9)		396,295.50
11. Total net tax (5 plus 10).....		$419,616.73

Plaintiff's Exhibit 38. 1087

General Information of Federal Estate Tax Return.

Place of death, Central Valley, New York. Did decedent die testate? No.

Cause of death, senility. Length of last illness, over one year.

Date of birth.....Place of birth.....

Business or occupation.....

Business address..... Number of children, one living; two deceased.

Married, single, separated, widowed, or divorced at date of death? Widowed. Were letters testamentary or 1088
of administration granted for this estate? Yes. Date granted, February 10, 1936.

Name and location of court, Surrogate's Court, Ontario County, Canandaigua, N. Y.

To whom granted? (Explain if different from the undersigned person or persons filing return) City Bank Farmers Trust Company, 22 William Street, New York, N. Y.

Did the undersigned person or persons filing return make diligent and careful search for property of every kind left by the decedent? Yes. Did the same undersigned make diligent and careful search for information as 1089
to any transfers of the value of $5,000 or more made by the decedent during his lifetime without an adequate and full consideration in money or money's worth? Yes.

Name and address of attorney representing estate, if any: Montgomery, Peabody, Grace & Derby, 1 Cedar Street, New York, N. Y.

1090

Plaintiff's Exhibit 39.

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ REFUND OF TAX ILLEGALLY COLLECTED.

1091 ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

State of New York }
County of New York } ss.:

Name of taxpayer City Bank Farmers Trust Company, as Administrator of all the goods, chattels and credits of Helen Hall Vail, deceased, late of Geneva, County of On-
1092 tario, New York.

Business address 22 William Street New York New York

Residence .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 28th New York

Plaintiff's Exhibit 39. 1093

2. Period (if for income tax, make separate form for each taxable year) from ....., 19.., to .....,19..
3. Character of assessment or tax Estate Tax
4. Amount of assessment, $466,912.27; date of payment 6/22/38 $436,031.67 Tax $30,880.60 Interest
5. Date stamps were purchased from the Government .....
6. Amount to be refunded $466,912.27 $.....
7. Amount to be abated (not applicable to income or estate taxes) ..... $.....
8. The time within which this claim may be legally filed expires, under Section 319 of the Revenue Act of 1926, as amended on June 23, 1941. 1094

The deponent verily believes that this claim should be allowed for the following reasons:

The Commissioner of Internal Revenue erroneously and unlawfully claiming authority under the provisions of Section 302(c) of the Revenue Act of 1926, as amended, has included in the decedent's gross estate the sum of $1,377,866.67, being the aggregate of certain allowances paid by the Committee of the property of the decedent, an incompetent person, during her lifetime, pursuant to two orders of the Supreme Court of the State of New York, in New York County, one dated January 14, 1927, and the other dated June 3, 1932. 1095

The allowances so paid were not transfers in contemplation of death and were not and are not within the purview and scope and meaning of Section 302(c) of the Revenue Act of 1926, as amended, for the following reasons:

City Bank Farmers Trust Company, as
Administrator of all the goods, chattels

1096 *Plaintiff's Exhibit 39.*

and credits of Helen Hall Vail, deceased, late of Geneva, County of Ontario, New York.

By P. A. MILLER
Trust Officer

(Corporate Seal)

Sworn to and subscribed before me this
7th day of July 1938.

1097 WILLIAM F. GERLACH
Notary Public,
Bronx County
Bronx County Clerk's No. 225, Reg. No. 216-C-40
New York County Clerk's No. 952, Reg. No. 0-G-574
Westchester County Certificate filed
My Commission expires March 30, 1940
(Notarial Seal)

1. The said allowances paid by the Committee were not paid at the instance or request of the decedent, who theretofore, in appropriate proceedings duly had in the
1098 Supreme Court of the State of New York, had been adjudged to be an incompetent person, incapable of governing herself and of managing her affairs and property.

2. The allowances were made by the Supreme Court of the State of New York in the exercise of power inherent in it as a court of equity and not in the exercise of authority derivative from the incompetent. Even a court of equity, in the guardianship which it exercises over incompetent persons and their estates, may not undertake the testamentary disposition of their property. This is governed by the statutory law of descent and distribution.

Plaintiff's Exhibit 39.

1099

3. Testamentary motive, which is essential to a gift in contemplation of death, cannot by any provision of positive law be attributed to a person who has been adjudged to be incompetent to manage herself and her affairs. A tax based upon a presumption so arbitrary and opposed to fact illegally deprives those interested in this estate of their property without due process of law guaranteed under the Constitution of the United States and its amendments.

4. The allowances were made pursuant to law out of the surplus income of the incompetent to her daughter and grandchildren after proceedings duly had in the Supreme Court of the State of New York, wherein the incompetent was represented by Special Guardian, and wherein it was found that the incompetent when sane was accustomed to make gifts to her daughters for purposes associated with life and that these allowances would have been made by her had she been in possession of her faculties. 1100

5. The Supreme Court of the State of New York had jurisdiction to make the allowances and its determination of their propriety is conclusive against the world. 1101

6. The fact that the decedent died intestate negatives any statutory presumption that the allowances, or any part of them, can have the character of gifts in contemplation of death. As testamentary motive was not evinced by the decedent when she was sane, it is absurd to attribute such a character to allowances made by the Court after she became insane.

7. As the orders made by the Supreme Court of the State of New York were unconditional, the allowances

1102 *Plaintiff's Exhibit 39.*

are not to be characterized as advancements, but even if they are viewed as such, they are nevertheless not taxable as gifts in contemplation of death.

8. With respect to such of the allowances as were paid subsequent to the enactment of the Gift Tax Act of 1932, the Commissioner of Internal Revenue has assessed and collected gift taxes upon such payments upon the theory that their legal status was that of gifts inter vivos made by the decedent during her lifetime. The Commissioner
1103 is now estopped to include the amount of these payments or any part of them in decedent's gross estate as transfers in contemplation of death.

Gift taxes assessed and paid upon the said allowances are as follows:

Calendar Year	Amount
1932	$18,525.00
1933	10,925.00
1934	12,350.00
1935	14,475.00
1104	$56,275.00

The said administrator has instituted an action against the Collector of Internal Revenue for the Second United States Collection District of New York, for the recovery of the amount of the gift taxes so paid. In the event of a final judicial determination that said gift taxes were legally assessed, City Bank Farmers Trust Company, as Administrator as aforesaid, hereby reserves the right to file a supplemental claim for refund of gift tax credit pursuant to Section 301(b) of the Revenue Act of 1926, as amended, and Section 402(b) of the Revenue Act of 1932, as amended.

Plaintiff's Exhibit 39. 1105

STATEMENT OF FACTS

Helen Hall Vail died on December 27th, 1935, intestate, a resident of Geneva, in the County of Ontario, State of New York. On February 10, 1936, Letters of Administration of all her goods, chattels and credits were duly granted and issued by the Surrogate's Court in the County of Ontario, New York, to the City Bank Farmers Trust Company of 22 William Street, New York, N. Y., as administrator. Said City Bank Farmers Trust Company duly qualified as such administrator and at all times since has acted and is now acting as such administrator. Said 1106
administrator heretofore filed in the Office of the Collector of Internal Revenue at Buffalo, New York, an Estate Tax Return on Form 706 for said estate, and in view of the foregoing no further evidence of its authority to act herein accompanies this claim.

The allowances were paid under the following circumstances:

In and by an inquisition as to the competency of Helen Hall Vail, taken by a Sheriff's Jury of New York County on the 11th day of August, 1926, in a proceeding duly instituted for that purpose, the said Jury found, among other things as follows: 1107

> "That the said HELEN HALL VAIL, for at least twelve months last past has been and now is a lunatic, suffering from cerebral arterio-sclerosis, with dementia, hallucinations, and senile arterio-sclerotic chorea, together with lack of insight and proper appreciation of her affairs and impairment of business judgment, and by reason thereof she is incapable of governing herself and managing her affairs and property, and incapable of properly taking care of her person, affairs and property. That the above condition still continues to exist at the present time."

1108 *Plaintiff's Exhibit 39.*

By an order of the Supreme Court of the State of New York in New York County dated August 12, 1926, the findings of said Sheriff's Jury were in all respects ratified, approved and confirmed, and The Farmers' Loan and Trust Company (now City Bank Farmers Trust Company) was duly appointed Committee of the Property and Estate of said Helen Hall Vail, an incompetent.

Thereafter and on or about the 12th day of November, 1926, application was made to the Supreme Court of the State of New York in New York County by MaBelle
1103 Houghton Plumb, a daughter of the incompetent, for the payment annually to persons named in her petition, *from the surplus income* received by the Committee, such allowances as to the Court should seem reasonable and proper. Upon the said petition, a referee was appointed to take proof of the facts and report thereon to the Court. In and by the report of the said Referee, it was, among other things, found that the said Helen Hall Vail was then 71 years of age; that she was the owner of certain real and personal property mentioned in the report, and was the life beneficiary of a trust created under the Last Will and Testament of Charles F. Houghton, deceased,
1110 her first husband, the annual income of which, for four or five years next preceding, had averaged over $300,000.00; "that the Last Will and Testament of said Charles F. Houghton, deceased, directs that upon the death of his wife, the said Helen Hall Vail, his residuary estate be divided into two equal parts, one of said parts to be held for the benefit of his daughter Laura the income to be paid to her during her life, and upon her death, leaving issue, the principal of said part or share to be divided between her issue, share and share alike. The other of said parts to be held for the benefit of his daughter, MaBelle, the income to be paid to her during her life and upon her death, leaving issue, the principal

Plaintiff's Exhibit 39.

1111

of such part or share to be divided between her issue share and share alike."

It further appeared from the report of the Referee that until their respective marriages, Laura Houghton Harris and MaBelle Houghton Plumb, the daughters of the incompetent, made their home with their Mother, who gave to each of them an annual allowance; these contributions were continued after the marriage of her daughters and were increased in amount; to each of them she gave a home of equal value and both before and after the marriage of her daughters, the incompetent manifested a disposition to benefit them by gifts of money and property. Furthermore, that prior to the time when she was judicially declared such, the incompetent had repeatedly and, over a long period of years, evinced kindly feelings toward her brother and sisters by contributing various annual sums to their support and maintenance. The referee further reported that the granting of all the allowances recommended by his report would coincide with the undoubted desires and intentions of the incompetent were she competent, as evidenced by the solicitude and generosity toward the several applicants displayed by her during competency.

1112

It further appeared from the said report of the Referee, that of the children of the incompetent, MaBelle Houghton Plumb was then alive but that her sister Laura, having theretofore married Ieuan Harris, was dead, leaving her surviving three children, John H. Harris, William R. Harris and David F. Harris. The Referee also found that the cost of maintaining the incompetent would fall far short of the sum of $50,000.00 per annum; that the disease, from which she suffered, was progressive in character and the chances of her recovery very slight. The report concluded with the following recommendation:

1113

1114 *Plaintiff's Exhibit 39.*

"After considering all the facts and circumstances, the advanced years of the incompetent and the incurable nature of her disease, and the fact that the annual income of the incompetent is vastly in excess of the amount required to maintain her in comfort and luxury, I recommend that there be granted annually to MaBelle Houghton Plumb an allowance of $50,000.; to Ieuan Harris, as General Guardian of John H. Harris, William R. Harris and David F. Harris the sum of $50,000., to be applied by him
1115 toward their maintenance and support; to Edward Hageman Hall an allowance of $2,000.; to Mary Hall Taft an allowance of $3,000.; to Elizabeth Hall Burdick an allowance of $2,000.; to Abee Ferrin an allowance of $2,000., and to Lucy Hall Ferris an allowance of $2,000. The Committee should be instructed accordingly."

The foregoing report was in all respects confirmed by order of the Supreme Court, entered in the office of the Clerk of New York County, on the 14th day of January, 1927.

1116 Thereafter and on or about the 26th day of April, 1932, MaBelle Houghton Plumb, the daughter of the incompetent above named, again petitioned the Supreme Court for an increase of the allowances made to herself and the children of her deceased sister, Laura Houghton Harris. Upon her petition, by an order of the Supreme Court in New York County, dated May 4, 1932, a Special Guardian was appointed to appear and defend the proceeding on behalf of the incompetent and a Referee was appointed to take proof upon all questions arising in the proceeding and report to the Court. Thereafter, testimony was taken before the said Referee who made and filed his report, dated the 25th day of May, 1932, wherein

Plaintiff's Exhibit 39.

1117

he found among other things, "That the disease from which the said Helen Hall Vail is suffering is cerebral arterio-sclerosis, with dementia, hallucinations, and senile arterio-sclerotic chorea, and that the same is incurable, and there is no possibility of her ever being able to take care of her property." The Referee further found that after a search made, no will of the incompetent had been discovered and that upon her death, one-half of her property would vest in her daughter, MaBelle Houghton Plumb, and the other half in her grandchildren above named. The Referee further found as follows:

1118

> "That no Will of the incompetent having been discovered, the granting of the allowances herein prayed for, cannot interfere with any testamentary plan of the incompetent, and the inference is clear from the past generosity displayed by the incompetent toward your petitioner, and her grandchildren, that the granting of the allowances would be in accord with the intention and desires of the incompetent were she now competent to make them herself."

It further appeared from the report of the Referee that since her commitment, the income of the incompetent had very largely increased and that the unexpended income, since accumulated in the hands of the Committee, amounted to more than $1,000,000.; that the relationship existing between the incompetent and her daughters during her normal life "was characterized by a spirit of generosity evidenced by substantial gifts to them and by many tokens of affection, and a desire on her part to carry out what she conceived to be the wishes of her deceased husband."

1119

Upon the above findings and others included in his report, the Referee recommended that the annual allow-

1120 *Plaintiff's Exhibit 39.*

ances out of income authorized by the order of January 14, 1927, be increased to $75,000.00 both for MaBelle Houghton Plumb and the children of her deceased sister, Laura Houghton Harris, and that these increases be made retroactive. This report was approved by an order of the Supreme Court, entered in the office of the Clerk of New York County, on the 3rd day of June, 1932, directing payment of allowances as recommended by the Referee.

Thereafter and on or about the 9th day of May, 1933, upon the application of City Bank Farmers Trust Com-
1121 pany, (formerly Farmers Loan and Trust Company), permission was granted to it by the Supreme Court of the State of New York, in New York County, to account as Committee of the Property of said Helen Hall Vail, an incompetent person. In this proceeding, a Special Guardian was appointed by the Court to protect the rights and interests of the incompetent. The accounts filed in this proceeding, (Schedule F-3), embraced the period from August 12, 1926 to July 1, 1933, and reflected all payments made by the Committee pursuant to the orders granting allowances hereinbefore mentioned, dated January 14, 1927 and June 3, 1932, in the aggregate
1122 amount of $994,866.67. The proceeding terminated in a judgment of the Supreme Court, dated the 19th day of February, 1934, wherein and whereby it was, among other things, ordered, adjudged and decreed that the payments made by the Committee of the Property of the said incompetent, as set forth in its account and supplemental account, be approved, ratified and confirmed.

The said Helen Hall Vail died on the 27th day of December, 1935, and thereafter, upon the application of City Bank Farmers Trust Company, as Committee of her estate, permission was granted to the Committee to make and render its final account, as Committee of the Property of the deceased incompetent person. This order

Plaintiff's Exhibit 39.

1123

directed that notice of the filing of the account be given to all persons interested in the estate. The account filed in this proceeding, Schedule G, embraced the period from July 1, 1933 to the date of death of Helen Hall Vail, December 27, 1935, and reflected all payments made by the Committee pursuant to the orders granting allowances heretofore made, dated January 14, 1927 and June 3, 1932, in the aggregate amount of $384,750.00. This proceeding terminated in a judgment of the Supreme Court, dated the 9th day of December, 1936, wherein and whereby it was, among other things, ordered, adjudged and decreed that the payments made by the Committee of the Property of the said incompetent, as set forth in its account, be approved, ratified and confirmed.

1124

Copies of the various Referees' Reports, Court Orders and Judgments referred to in this claim are not attached hereto, for the reason that certified copies thereof were filed in the Office of the Commissioner of Internal Revenue in connection with the protest of the Administrator against a proposed deficiency in Estate Tax, verified December 17th, 1937, upon which protest a hearing was granted on January 7th, 1938. Said documents were submitted under the symbols:

1125

MT-ET-4169-28th New York
Estate of Helen Hall Vail
Date of death—December 27, 1935.

The aforesaid Reports, Court Orders and Judgments are incorporated herein and made a part hereof as though herein fully set forth.

The foregoing claim was prepared by the undersigned, attorneys enrolled to practice before the Treasury Department, and two of the attorneys designated to act in

1126 *Plaintiff's Exhibit 40.*

this matter in a Power of Attorney dated December 17, 1937 and filed in the Office of the Commissioner of Internal Revenue.

We know of our own knowledge that the facts stated therein are true, except as to the facts stated therein on information and belief, and as to those facts we believe them to be true.

Dated, New York, N. Y., July 7, 1938.

FREDERICK P. KING,
1127 160 Broadway, New York, N. Y.

JAMES LLOYD DERBY,
One Cedar Street,
New York, N. Y.

Plaintiff's Exhibit 40.

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue
Address Reply to
1128 Commissioner of Internal Revenue
and Refer to
MT-ET-4169-28th New York

Estate of HELEN HALL VAIL
Date of death—December 27, 1935.

CITY BANK FARMERS TRUST COMPANY,
Administrator,
22 William Street,
New York, New York.

Nov 3—1937

Sirs:

A deficiency in the Federal estate tax liability of the above-named estate is hereby proposed as the result of

Plaintiff's Exhibit 40.

1129

an examination of the return, Form 706, the revenue agent's report, and other data on file.

If you acquiesce in the proposed deficiency, you are requested to execute and forward the enclosed Form 890, which is a waiver of the statutory restrictions upon the immediate assessment and collection of the deficiency. The submission of the waiver will expedite the closing of the case and will also lessen the accumulation of interest, since the interest period will then terminate thirty days after filing of the waiver or on the date of assessment, whichever is earlier. Should you desire to consent to the 1130
assessment and collection of only a part of the deficiency, the waiver may be executed for such partial amount. The execution of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax.

The issuance of this notice does not permit a petition to the United States Board of Tax Appeals. However, a protest against the proposed deficiency may be filed within 30 days from the date of this letter. If a hearing is desired in this office, or if no hearing is contemplated, the protest should be filed with this office. If a hearing is desired in the local division, the protest should be filed with the Internal Revenue Agent in Charge, Buffalo Division. A 1131
protest must be filed in duplicate, and (a) present fully the grounds upon which made, supported by the evidence relied upon, and (b) state whether a hearing is desired. Any statements of fact included therein must be under oath.

If the case cannot be closed upon the basis of a waiver, or if a protest is not filed within the specified time, a formal notice of deficiency will be issued under section 308(a) of the Revenue Act of 1926, as amended, and you may then petition the United States Board of Tax Appeals for redetermination of the tax liability.

A copy of this letter is being forwarded to the Internal Revenue Agent in Charge at 200 U. S. Courthouse, Niagara Square, Buffalo, New York.

1132 *Plaintiff's Exhibit 40.*

Examination of the return discloses the following:

	Returned		*Tentatively Determined*	
Gross estate	$2,392,162.48		$3,781,604.15	
Deductions (1926 Act)	579,872.09		566,992.73	
Net estate (1926 Act)	1,812,290.39		3,214,611.42	
Gross estate	2,392,162.48		3,781,604.15	
Deductions (1932 Act)	519,872.09		506,992.73	
Net estate (1932 Act)	1,872,290.39		3,274,611.42	
1. Gross tax (1926 Act)	116,606.14		264,253.37	
2. Credit for gift tax	0.00		0.00	
1133 3. Gross tax less gift tax credit	116,606.14		264,253.37	
4. Credit for estate or inheritance tax	93,284.91		0.00	
5. Net tax (1926 Act)		$23,321.23		$264,253.37
6. Total gross taxes (1926 and 1932 Acts)	512,901.64		1,073,429.02	
7. Gross tax (1926 Act)	116,606.14		264,253.37	
8. Gross additional tax	396,295.50		809,175.65	
9. Credit for gift tax	0.00		0.00	
10. Net additional tax		396,295.50		809,175.65
11. Total net tax		419,616.73		1,073,429.02
Amount assessed as deficiency pursuant to waiver		0.00		419,616.73
Deficiency				653,812.29

1134

The deficiency bears interest at the rate of 6 per cent per annum from 15 months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

GROSS ESTATE

Other Miscellaneous Property	*Returned*	*Tentatively Determined*
Item 1	$23,538.00	$31,913.00

Plaintiff's Exhibit 40.

1135

Additional items:

Solitaire diamond ring 4½ carats	0.00	2,200.00
Canary diamond ring 2½ carats with small diamonds	0.00	1,000.00

Transfers	*Returned*	*Tentatively Determined*
The value of the following described property is included in the gross estate under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended:		
Payments made from estate pursuant to orders of the Supreme Court, New York County, New York, dated January 14, 1927 and June 3, 1932	0.00	$1,377,866.67

1136

1137

DEDUCTIONS

	Tentatively Determined	*Returned*
Administrator's commission	$45,798.25	$46,300.00
Attorneys' fees	46,000.00	57,500.00
Miscellaneous administration expenses: 8th item	0.00	877.61
To balance	$1,402,321.03	

The deduction for administrator's commission is reduced

1138 *Plaintiff's Exhibit 40.*

amount which will be paid according to the affidavit of P. A. Miller, trust officer of the administrator company.

Under miscellaneous administration expenses, the deduction for the 8th item, representing 1936 State, county and city taxes, is disallowed since it appears that these taxes accrued after the date of the decedent's death.

CREDIT

No allowance is made for credit on account of State
1139 estate, inheritance, legacy or succession taxes paid for the reason that the evidence required under Article 9, Regulations 80, has not been submitted. Please advise when the credit evidence may be expected.

If the full eighty per cent credit is allowed, the net deficiency tax will be $442,409.59. Execution of the enclosed waiver as to that amount will enable the Bureau to assess the full amount of the probable net tax and expedite the closing of the case.

Respectfully

1140 D. S. Bliss,
Deputy Commissioner.

Enclosures:
Waiver.
Summary

Plaintiff's Exhibit 41. 1141

80M Rev. June, 1934

TREASURY DEPARTMENT

Washington

Apr 5 1938

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue 1142
and Refer to

MT-ET-Cl-4169-28th New York

Estate of Helen Hall Vail
Date of death—December 27, 1935

City Bank Farmers Trust Company, Administrator,
22 William Street,
New York, New York.

Sirs:

A deficiency of $645,654.48 in the Federal estate tax 1143
liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may

1144 *Plaintiff's Exhibit 41.*

be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing
1145 of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency
1146 will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner.

By D. S. BLISS
D. S. Bliss,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890.

Plaintiff's Exhibit 41. 1147

STATEMENT

The protest relates to the following items:

GROSS ESTATE

Transfers	*Returned*	*Tentatively Determined*	*Determined*
Payments made from the decedent's estate pursuant to the orders of the Supreme Court of New York, dated January 14, 1927, and June 3, 1932	$ 0.00	$1,377,866.67	$1,377,866.67

1148

After a careful review of all of the evidence of record it is held that the above transfers were properly included in the decedent's gross estate under the provisions of section 302 (c) of the Revenue Act of 1926, as amended.

DEDUCTIONS

1149

Debts of decedent:

Item 2	23,153.39	23,153.39	31,038.30
Item 3	30,000.00	30,000.00	40,655.57

The above items under debts of decedent have been increased to cover the additional amounts paid subsequent to the filing of the return.

1150 *Plaintiff's Exhibit 41.*

The following tabulation shows the Federal estate tax liability of this estate which is hereby made final:

Gross estate		3,781,604.15
Deductions, 1926 Act		585,533.21
Net estate, 1926 Act		3,196,070.94
Net estate, 1932 Act		3,256,070.94
Gross tax, 1926 Act	$ 262,028.51	
1151 Credit for estate or inheritance taxes	0.00	
Net tax, 1926 Act		262,028.51
Total gross taxes, 1926 and 1932 Acts	1,065,271.21	
Gross tax, 1926 Act	262,028.51	
Additional tax		803,242.70
Total net tax		$1,065,271.21
Amount assessed on return		419,616.73
1152 Deficiency		$ 645,654.48

No credit is allowed for either gift tax or State estate, inheritance, legacy or succession taxes at this time as the gift tax has not been finally determined and the inheritance tax credit evidence has not been submitted.

The deficiency bears interest at the rate of six per cent per annum from fifteen months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Plaintiff's Exhibit 43. 1153

TREASURY DEPARTMENT

WASHINGTON

Jul 28 1938

OFFICE OF
COMMISSION OF INTERNAL REVENUE

Address Reply to
Commissioner of Internal Revenue
and Refer to

1154

MT-ET-Ci-4169-28th New York
Estate of Helen Hall Vail
Date of death—December 27, 1935

City Bank Farmers Trust Company, Administrator,
22 William Street,
New York, New York.

Sirs:

Reference is made to the claim filed by you on July 9, 1938, for the refund of $466,912.27 representing a part of the Federal estate tax paid in behalf of the above-named 1155 estate.

In support of the claim it is contended that certain distributions of the decedent's property made pursuant to several orders of the Supreme Court of the State of New York were not made in contemplation of death and therefore the value of the property so distributed should be excluded from the gross estate.

The record shows that the referee found that the decedent, an incompetent person, was of advanced years; that she was suffering from an incurable disease of progressive character; that the chances of her recovery were very

Plaintiff's Exhibit 43.

1156 slight; that the decedent had made no will; and that upon her death her property would vest one-half in her daughter, MaBelle Houghton Plumb, one of the distributees, and one-half in her three grandchildren, the other distributees.

The several reports of the referee were approved by the Supreme Court of New York and the distributions were made pursuant thereto. No showing has been made that the distributees were in need of financial assistance. The action of the court in ordering distribution of the property of an incompetent person is the action of the incompetent.

1157 The facts show that the transfers were made in contemplation of the decedent's death and the value of the property transferred was properly included in decedent's gross estate under the provisions of section 302 (c) of the Revenue Act of 1926.

In view of the foregoing, the claim for refund filed by you on July 9, 1938, is hereby rejected.

Respectfully,

GUY T. HELVERING,
Commissioner.

1158

By: D. S. BLISS,
Deputy Commissioner.

Opinion.

1159

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

APPEARANCES:

MONTGOMERY, GRACE & DERBY, for Plaintiff; James Lloyd Derby and J. Seymour Montgomery, Jr., of Counsel. 1160

Hines, Rearick, Dorr & Hammond; John K. Watson and Paul Smith; Moot, Sprague, Marcy & Gulick; Welles V. Moot, of Counsel.

Dean, King, Smith & Taylor; Amicus Curiae, Frederick P. King, of Counsel.

GEORGE L. GROBE, United States Attorney; Robert M. Hitchcock, Assistant United States Attorney, for Defendant.

KNIGHT, District Judge: 1161

This is an action by the plaintiff as administrator of the estate of Helen Hall Vail, deceased, to recover $466,912.27 from the defendant as Collector of Internal Revenue for the Twenty-eighth Collection District, New York. Plaintiff, under protest, paid the aforementioned amount, which included interest, on account of the federal estate tax liability in respect to the estate of Helen Hall Vail, deceased, under Section 302 (c) of the Revenue Act of 1926, as amended. Plaintiff filed a claim for refund, which was rejected by the Commissioner of Internal Revenue, and thereafter this action was commenced to recover sums paid as aforesaid.

1162 *Opinion.*

The deceased was duly adjudged to be an incompetent person by the Supreme Court of the State of New York in August, 1926, and plaintiff was appointed committee of her property. Thereafter a daughter, MaBelle H. Plumb, petitioned the New York Supreme Court for allowances for herself and others out of the surplus income of the incompetent. By order of the Court, January 14, 1927, the committee was directed to make annual payments of $50,000 to the incompetent's daughter and $50,000 to the guardian of three infant grandchildren and smaller
1163 amounts to collaterals of the incompetent, out of the incompetent's income. The order included a finding of fact that the incompetent would have made such allowances if she had been in possession of her mental faculties. By later order, June 3, 1932, the Court directed the committee to increase the amounts to be paid to the incompetent's daughter and the guardian of three infant grandchildren to the extent of $25,000 per annum and made these increased allowances retroactive to the extent of five and one-fourth years. This order, like the earlier order, was based on a finding that the incompetent would have made such allowances if she had been possessed of her mental faculties. Pursuant to these orders there were
1164 paid out of the surplus income of the incompetent to the persons therein named allowances aggregating the sum of $1,377,866.67.

The Committee of the property of the incompetent, in 1933, filed an intermediate account for the period from August 12, 1926, the date of its appointment, to July 1, 1933, which embraced and reflected all payments made during this period pursuant to the orders of the Court. Thereafter an order was made and entered which approved, ratified and confirmed all the payments made by the Committee, as set forth in its account.

The incompetent, Helen Hall Vail, died on December 27, 1935, and thereafter the Committee rendered a final

1165

account that embraced and reflected all payments made by the Committee for the period July 1, 1933, to December 27, 1935, which was confirmed, ratified and approved by a final judgment of the New York Supreme Court.

There were two sets of objections interposed by the defendant to the introduction of certain evidence on the trial upon which the Court then reserved decision. The first set of objections was to the reception in evidence of certain exhibits of records of the Surrogate's Court of Orlans County purporting to show the fixation of a transfer tax by the State of New York, and also the proceeding upon the intermediate and final accounting of the Committee of the incompetent in the Supreme Court in New York State. The objections are sustained and the evidence given relative thereto excluded upon the ground that the evidence is immaterial. The sense in which it is immaterial hereinafter appears.

1166

The second set of objections relates to the admission of the deposition of Mr. Justice Lydon. While counsel for the plaintiff argues that such testimony is admissible, counsel for the Harris children, appearing amicus curiae, contends that such testimony is inadmissible. There is no claim that the orders of the Supreme Court of the State of New York are in any way ambiguous, and the only purpose of the introduction of the depositions of Justice Lydon is to prove that in the 1927 proceeding the Court had no intent to make a testimentary transfer in contemplation of death. Mr. Justice Ingraham is deceased, so any claim as to his motive in granting allowances must be found in the records of his court. In my opinion the deposition of Justice Lydon is incompetent for any purpose. In so far as the proceedings looking to the payment of the money out of the estate are concerned, the records thereof are the best evidence. There is no claim made of any ambiguity in the records.

1167

1168 *Opinion.*

"The rule under discussion is stringently enforced to forbid the admission of any parol or extrinsic evidence to contradict, impeach, vary, or explain judicial records, especially where the right of third persons acquired under a judgment would be affected. * * * It also precludes the admission of evidence showing the grounds of a judgment, order, or decree, or to show that the grounds on which a judgment was apparently based did not exist, or that a verdict was improper." Corpus Juris, Section 1388, Vol. 22, p. 1077.

1169

The following cases are also in point on the specific question presented: Matter of Fiegler, 248 N. Y. 415; Agan v. Hey, 30 Hun. (N. Y.) 591; Blue Mountain Iron & Steel Co. v. Portner, 131 F. 57; Lyon v. Perin Mfg. Co., 125 U. S. 698; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 F. 813.

This action arises over the interpretation of Section 302 of the Revenue Act of 1926, as amended by Section 803(a) of the Revenue Act of 1932; now Section 811 (c) of Internal Revenue Code. So far as material, its provisions are as follows:

1170

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real and personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer,

1171

by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; * * *"

1172

One contention made by the plaintiff is that the statute is to be construed literally and, since Mrs. Vail was an incompetent, there could not have been made any transfer in contemplation of death. Such contention is controverted both by the defendant and counsel for the Harris heirs. It is without merit. The issue is whether the transfers were in contemplation of death within the scope and meaning of the law, and the determination here is to be found in the proceedings had leading to the deduction from the estate of the incompetent. Any question in this regard is answered in the decision in City Bank Farmers Trust Co. v. Hoey, Collector, etc., 23 F. Supp. 831, affirmed 101 F. (2d) 9, relative to the transfers here in question. In the District Court decision, Judge Patter-

1173

son said: "Such payments have the status of gifts made by the incompetent acting through the Court", and Judge Chase on the appeal said: "It is clear, as the parties agree, that the transfers * * * were gifts."

There can be no question that the Supreme Court under its broad powers can make allowances out of the surplus income of an incompetent "upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind." Matter of Lord, 227 N. Y. 145; In re Andrews, 192 N. Y. 514; Matter of
1175 Flagler, 248 N. Y. 415; Pomeroy, Equity Jurisprudence, Vol. 1, 4th Ed. (1918) Sec. 384, n. It has not the power to make a will for the incompetent or to say what disposition should be made of the property after death. Ex parte Whitebread, 2 Mer. 99, 35 Eng. Rep. 878 (1816); Matter of Salisbury, 3 Johns Ch. (N. Y.) 347 (1818); Lewis v. Jones, 50 Barb. 645 (N. Y.); and Section 1383 New York Civil Practice Act. Further, undoubtedly the judgment and decrees of the court are presumed to be within the jurisdiction and power of the court. Voorhees v. Bank of the U. S., 10 Pet. 449; Freeman on Judgments, 5th Ed. p., 831, Sec. 387, and it is not likely that the
1176 court would be "party to a scheme to enable a private company to avoid federal taxation." But all this seems beside the point. A finding by the state court that Mrs. Vail would have made a gift of the amounts herein shown does not preclude a finding in this court that those gifts were made in contemplation of death. The rule is stated in Commissioner v. Greene, 119 F. (2d) 383, that "State law may control only when the Federal Taxing Act, by express language or necessary implication, makes its own operation dependent upon State law", and further, "Since local law is not controlling, it is immaterial what local statutes said, or local Courts held."

Opinion.

1177

The purpose of Congress is enacting the taxing statute was to prevent tax evasion. The dominant purpose is to reach substitutes for testamentary dispositions and to prevent evasion of the tax. United States v. Wells, 283 U. S. 102. Obviously without such statutes transfers in any amount could be made at any time and a tax upon succession of interest evaded.

The test of whether or not a donative transfer inter vivos was in contemplation of death, within the meaning of the Revenue Act, is the motive. The differentiation between gifts made in contemplation of death and those not so made "must be found in the transferor's motive." United States v. Wells, supra. Determination that the transfer is in contemplation of death is not dependent on finding that the transferor then entertains thought of death but rather whether the transfer was made in anticipation of succession. United states v. Wells, supra.

1178

Motive means not only purpose but means the measure of the purpose. "It must be a particular concern, giving rise to a definite motive" United States v. Wells, supra. Motive here must be found from the record of the proceedings in the State Courts. The Committee through the action of the court could only do that which it may reasonably be said the incompetent if competent would have done.

1179

Mrs. Vail was adjudicated to be incompetent and a Committee of her property appointed on August 12, 1926. On November 12, 1926, or just two months thereafter, the first application for allowances was made to the Supreme Court. The annual income of the incompetent for four or five years preceding the adjudication of incompetency had averaged $318,000. In 1917 Mrs. Vail gave each of her two daughters a valuable home, and for some years prior to 1926 had made Mrs. Plumb and Mrs. Harris an annual allowance of $6,000. In 1917 she also gave Mrs.

Plumb an additional $5,000. Otherwise there was no variance in the allowance to Mrs. Plumb. She never made an allowance for the benefit of the Harris children or to the collateral heirs. In January, 1927, the first order of the Supreme Court was made directing the payment of $50,000 out of the incompetent's income annually to Mrs. Plumb; to the general guardian of the Harris children $50,000, and to each of five collateral heirs $2,000. On June 3, 1932, the annual allowance to Mrs. Plumb and the guardian of the Harris children was increased to $75,000,
1181 and the increase of $25,000 was made retroactive for a period of 5 and one-quarter years. During those five years the average annual income of the incompetent was approximately $450,000. While it appears that the father of the Harris children had a gross annual income of approximately $200,000, the Referee who passed on the first petition recommended, that the allowance for them be given "to be applied by him—'general guardian' toward their support and maintenance." There is nothing to show the income of Mrs. Plumb's husband, but it does appear that she had an annual income of $150 from some other estate. There is evidence that Mrs. Vail had made
1182 an allowance to a sister, Mrs. Ferris, of approximately $500 annually and given some money and gifts to others of the collaterals at irregular intervals and in varying amounts. Neither petition contains any recital of any need on the part of either Mrs. Plumb or the Harris children.

"Need" is not a necessary element of the motive to be attributed to the incompetent. Neither is age such element. However, both may be taken into consideration in determining motive. Specially should need be considered here where it is urged that these allowances were made in order that the beneficiaries could have greater advantages. Concededly the burden rests upon the plain-

tiff to establish that these gifts were donative and not made in anticipation of the natural succession to the decedent's property or in contemplation of death.

It seems to me that plaintiff has not borne the burden placed upon it; that the evidence does not warrant the conclusion that the incompetent, if competent, would have made these allowances.

Among others, there are these outstanding facts:

(1) When adjudicated incompetent Mrs. Vail was 74 years of age. She was suffering from an incurable ailment. 1184

(2) Mrs. Vail was adjudged incompetent August 12, 1926. Less than two months after such adjudication, to wit, on October 8, 1926, the first petition of Mrs. Plumb for the fixation of allowances was verified.

(3) Allowances of Mrs. Vail to her daughters had never exceeded $6,000 per year to each. In 1912 she gave each $1,500; in 1913, $3,000; and since 1914, $6,000 annually. At one time she did give Mrs. Plumb $5,000 in addition and to each of her two daughters a residence of considerable value. 1185

(4) While the record does not disclose the amount of the estate of Mrs. Vail in 1912, it is clear that it was a large amount, and it had been accumulating from 1897, when her husband died. Yet, as appears, until 1914, the allowances to the daughters did not exceed $3,000 annually to each.

(5) For the five years preceding the adjudication the average annual income from the trust was $318,000, yet during that time the allowance to each daughter did not exceed $6,000.

(6) Since the adjudication the incompetent's income has increased on the average annually not to exceed 23 percent over what it averaged five years preceding adjudication, yet the allowances to the daughters were jumped from $6,000 to $50,000, or 800 per cent.

(7) There is no proof that any allowances were ever made to the collateral heirs, save to Mrs. Ferris to whom an allowance of $500 annually appears to have been paid. Attention is called to the fact that proof of this allowance and proof of gifts to other collaterals is purported
1187 to be made by letters written by relatives of the collaterals to Mrs. Plumb after the adjudication herein was made. Clearly the letters were not competent evidence.

(8) Neither the petition of 1926 nor that of 1932 shows any need on the part of any of the direct or collateral heirs.

(9) The Referee in the 1926 proceeding recommended an allowance of $50,000 to the general guardian of the Harris children to be applied by him to their "maintenance and support." Yet the father of these children had a gross income of $200,000. It is admitted that this
1188 allowance for them was not needed.

(10) The records of the proceedings in 1926 and 1932 clearly show purpose to equalize allowances to direct heirs so that each eventually would share equally in the estate of the incompetent.

(11) The increase in the allowance in 1932 can be supported on no theory save that it was a gift in anticipation of succession to the estate.

(12) The retroactive allowances aggregating $250,000 can be justified as a donative gift on no plausible theory or reason. The making of these allowances did exactly

1189

what one of the attorneys in the proceedings then said that he feared might be the result if a flat increase of $250,000 were made. He said: "It seems to me to be the idea of distributing part of the incompetent's estate in anticipation more or less of her death." Whether this $250,000 was split into five payments or whether it was paid as single payment as of date of order, obviously is of no consequence.

(13) A substantial part of this estate was withdrawn by these allowances. The amount, as heretofore stated, was $1,377,866.67.

1190

(14) The records of both proceedings speak of sums to be obtained as "allowances", and they contain the stipulation of Mrs. Plumb that the ultimate amount she should receive from the estate of the incompetent should not exceed that to be paid the general guardian on account of the Harris children; and these allowances in this connection are spoken of as "advancements." The characterization of such as "advancements" is not conclusive as to motive, but it is important in connection with other factors.

1191

(15) The theory of counsel for the interested parties is expressed in the record before the Referee "that by granting these allowances to the children and grandchildren will be simply giving them what they will eventually get in the end," and "where it is impossible for her (incompetent) to use it by reason of the misfortune of her mental and physical condition, that then this court can make an advancement, and in this case it is proper it should do so." The ideas as above stated are expressed in various comments made by counsel for Mrs. Plumb and for the general guardian.

1192 *Opinion.*

(16) In the 1932 proceedings Mrs. Plumb testified that $50,000 allowance per year was not sufficient to maintain herself and son and to send him to college. It is rather extraordinary statement, but, assuming it to be true, it is no proof that Mrs. Vail would have increased an allowance of $6000 to $75,000 at one time. The allowance fixed in 1932, retroactive as of 1926, in effect increases by 1200 percent the allowance last made by Mrs. Vail to each of the direct heirs.

In City Bank etc. v. Hoey, supra, no question was
1193 raised as regards these gifts being made in contemplation of death. Naturally it would not have been. The court could not then properly have considered any question of intent or motive. The gift tax and the estate tax are "not mutually exclusive in all cases." Hesslein v. Hoey, 91 F. (2d) 954.

As I have examined the numerous cases cited by the plaintiff and the attorney for the guardian of the Harris children as amicus curiae, I find none that present comparable facts. There are so many cases on what constitutes gift made in contemplation of death within the statute, but it would be quite unusual to find two pre-
1194 senting facts which are comparable.

If I had the authority to change the allowances as made by the orders of the state court to the direct heirs by reducing them below $75,000 but exceeding $6000 in some amount, I would be disposed to do so. I do not believe that I have the authority to do so.

Conclusions of Law.

I find and decide that:

1. All sums of money paid to MaBelle Houghton Plumb and Ieuan Harris, general guardian of John H. Harris,

1195

William H. Harris and David F. Harris, minor grandchildren of the aforesaid incompetent, and Edward Hageman Hall, Mary Hall Taft, Elizabeth Hall Burdick, Abee Perrin and Lucy Hall Ferris by the Committee of the property of Helen Hall Vail, and purported to be paid pursuant to an order granted by Hon. Richard P. Lydon, Justice of the Supreme Court of the State of New York, on January 14, 1927, were payments made in contemplation of death and succession to the estate of said incompetent, save and except the sum of $6000 paid annually since 1926 to MaBelle Houghton Plumb and Ieuan Harris, as general guardian of John H. Harris, William H. Harris and David F. Harris, grandchildren of the incompetent, and the sum of $500 paid to Lucy Hall Ferris.

1196

2. All sums of money paid to MaBelle Houghton Plumb and Ieuan Harris, general guardian of John H. Harris, William H. Harris and David F. Harris, minor grandchildren of the aforesaid incompetent, and Edward Hageman Hall, Mary Hall Taft, Elizabeth Hall Burdick, Abee Ferrin and Lucy Hall Ferris by the Committee of the property of Helen Hall Vail, and purported to be made pursuant to an order granted June 3, 1932, by Hon. Felix Ingraham, Justice of the Supreme Court of the State of New York, were payments made in contemplation of death and succession to the estate of said incompetent, save and except the sum of $6,000 paid annually to MaBelle Houghton Plumb and Ieuan Harris, as general guardian of John H. Harris, William H. Harris and David F. Harris, grandchildren of the incompetent, and the sum of $500 paid to Lucy Hall Ferris.

1197

The payments aforesaid in the amounts of $6000 and $500 aforesaid were motivated by the same motive which would have lead the incompetent, Helen Hall Vail, to make payments in these amounts to these respective parties.

1198 *Opinion.*

3. Plaintiff is entitled to recover the amount of the tax fixed by law as a tax upon the estate of the deceased, computed on $12,500 per year for each year commencing with 1926 and continuing to December 27, 1935, with interest.

4. The plaintiff is entitled to no recovery herein, except as aforesaid.

If desired, the parties hereto may submit to the court
1199 findings, which upon adoption will be made a part of this opinion.

February 24, 1942.

JOHN KNIGHT,
United States District Judge.

Filed Feb. 25, 1942.

1200

Findings of Fact and Conclusions of Law. 1201

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

The issues in this action having been brought to trial before the Honorable John Knight, United States District Judge, and the parties having waived a trial by jury by not making demand therefor and thereby consenting 1202
to the trial and determination of the cause by the Court without a jury, and all the parties having appeared and the Court having heard the allegations, proofs and arguments of the respective parties, and the Court being fully advised in the premises, and due deliberation having been had, and this Court having made and filed its written opinion dated February 24, 1942, the Court hereby makes the following:

FINDINGS OF FACT

I 1203

Plaintiff, City Bank Farmers Trust Company, is a corporation duly organized and existing under the laws of the State of New York and having its principal place of business at No. 22 William Street, Borough of Manhattan, City of New York, and is the duly appointed, acting and qualified administrator of the goods, chattels and credits of Helen Hall Vail, deceased, late a citizen and resident of the State of New York, who died intestate on December 27, 1935.

1204 *Findings of Fact and Conclusions of Law.*

II

The defendant, George T. McGowan, from and after August 25, 1933, was, and still is, Collector of Internal Revenue for the Twenty-eighth Collection District at Buffalo, New York, and resides therein.

III

On or about August 12, 1926, the said Helen Hall Vail, pursuant to proceedings in the Supreme Court of the
1205 State of New York in and for the County of New York, a court of competent jurisdiction, was duly adjudged to be an incompetent person, incapable of managing herself and her affairs.

IV

On or about August 25, 1926, the plaintiff, then known as The Farmers Loan and Trust Company, was duly appointed Committee of the property and estate of said Helen Hall Vail, and thereupon duly qualified and continued to act as such Committee until the death of said Helen Hall Vail.

1206

V

Following plaintiff's appointment as Committee of the property and estate of said Helen Hall Vail, her daughter, MaBelle Houghton Plumb, on October 8, 1926, petitioned the Supreme Court of the State of New York, New York County, for fixation of allowances to herself and others out of the surplus income of the incompetent.

By order of the court, entered January 14, 1927, the plaintiff, as Committee of the property of Helen Hall Vail, was directed to pay out of the incompetent's surplus income each year in quarterly payments the following sums to the following named persons:

1207

To MaBelle Houghton Plumb, daughter of said incompetent person, the sum of Fifty Thousand ($50,000.) Dollars.

To Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of said incompetent person, the sum of Fifty Thousand ($50,000.) Dollars.

To Edward Hegeman Hall, a brother of said incompetent person, the sum of Two Thousand ($2,000.) Dollars.

1208

To Mary Hall Taft, a sister of said incompetent person, the sum of Three Thousand ($3,000.) Dollars.

To Elizabeth Hall Burdick, a sister of said incompetent person, the sum of Two Thousand ($2,000.) Dollars.

To Abbe Ferrin, a sister of said incompetent person, the sum of Two Thousand ($2,000.) Dollars.

To Lucy Hall Ferris, a sister of said incompetent person, the sum of Two Thousand ($2,000.) Dollars.

1209

In its order of January 14, 1927, the Supreme Court found that the incompetent would have made such allowance if she had been in the possession of her mental faculties.

VI

MaBelle Houghton Plumb on April 26, 1932, petitioned the Supreme Court of the State of New York, New York County, for an order directing the City Bank Farmers Trust Company, as Committee of the property of Helen Hall Vail (incompetent) to pay her out of its unexpended

1210 *Findings of Fact and Conclusions of Law.*

surplus income in the possession of the Committee $250,000 and $250,000 to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of said incompetent. This petition was amended on or about May 25, 1932, the petitioner praying that the Court allow an additional allowance of Twenty-five thousand dollars ($25,000.) a year to her and an additional Twenty-five thousand dollars ($25,000.) a year to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris,
1211 infants, and further that said allowance be made retroactive to cover the years 1927, 1928, 1929, 1930 and 1931, so that there would be paid to the petitioner a back or retroactive allowance of One hundred twenty-five thousand dollars ($125,000.) and that to be paid to Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, infants, a back or retroactive allowance of One Hundred twenty-five thousand dollars ($125,000.). The amended petition was allowed by order of the Supreme Court of the State of New York, New York County, entered June 3, 1932, which provided that plaintiff as Committee of the incompetent was to pay
1212 out of the income of said incompetent person received by it in each quarter in addition to the amounts paid by said Committee under said order dated January 14, 1927, to MaBell Houghton Plumb the sum of $6,250 and to Ieuan Harris as General Guardian as aforesaid, the sum of $6,250.

VII

The Court's order of June 3, 1932, by its terms, was made retroactive and directed the said Committee to pay out of the accumulated surplus income of the incompetent person, then in its possession, to MaBelle Houghton

1213

Plumb and Ieuan Harris as General Guardian, as aforesaid, the sum of $131,250, each, as and for a payment of $25,000 per annum for the five calendar years prior to the entry of such order and for the payment of $6,250 to each as and for the quarterly installment due March 31, 1932, of the additional allowances granted by said order of June 3, 1932.

VIII

1214

Pursuant to the two orders of the Supreme Court of the State of New York, dated January 14, 1927, and June 3, 1932, respectively, and from the date of the first order to December 27, 1935, the date of the death of the incompetent, Helen Hall Vail, plaintiff, as Committee of the property of said Helen Hall Vail, paid, out of the surplus income of the incompetent, to the persons named in said orders allowances aggregating the sum of $1,377,866.67.

IX

1215

Plaintiff, as the Committee of the property and estate of the incompetent, on or about May 9, 1933, filed with the Supreme Court of the State of New York, New York County, an account of its proceedings for the period from August 12, 1926, to July 1, 1933, which embraced and reflected all payments made during said period by said Committee pursuant to the orders entered by the Supreme Court of the State of New York, on January 14, 1927, and June 3, 1932, respectively.

Thereafter an order was made and entered by the court which approved, ratified and confirmed all of the payments made by said Committee for the period from August 12, 1926, to July 1, 1933.

1216 *Findings of Fact and Conclusions of Law.*

X

After the death of Helen Hall Vail plaintiff rendered its final account as Committee to the Supreme Court of the State of New York, New York County, embracing and reflecting all payments made by it for the period from July 1, 1933, to the date of the death of the incompetent, December 27, 1935, which was thereafter confirmed, ratified and approved by a final order of said Supreme Court.

1217

XI

On or about January 27, 1937, plaintiff, as administrator of the goods, chattels and credits of Helen Hall Vail, deceased, filed with the defendant, pursuant to the Revenue Act of 1926 and the Revenue Act of 1932, as amended, an estate tax return. In Schedule E of said return plaintiff, as such administrator, set forth for information purposes the aggregate amount of the allowances paid pursuant to said orders of January 14, 1927, and June 3, 1932, to-wit, the sum of $1,377,866.67; but plaintiff did not include said amount in computing the
1218 estate tax payable by it as such administrator.

XII

Thereafter the Commissioner of Internal Revenue audited and reviewed plaintiff's estate tax return and thereupon on April 5, 1938, determined a deficiency in decedent's federal estate tax liability in the sum of $645,654.48, of which the sum of $436,031.67 was attributable to the inclusion in the decedent's gross estate of said sum of $1,377,866.67, under the provisions of Section 302(c) of the Revenue Act of 1926, as amended.

1219

XIII

Of said deficiency of $645,654.48 assessed by the Commissioner, the sum of $436,031.67, together with interest thereon in the sum of $30,880.60, or a total of $466,912.27 was paid by the plaintiff on June 22, 1938.

XIV

Thereafter, on or about July 9, 1938, plaintiff, as such administrator, filed with the defendant its claim for refund of said sum of $436,031.67, together with interest thereon in the sum of $30,880.60, or for the sum of $466,912.27, which claim for refund was thereafter, on or about July 29, 1938, wholly rejected and denied in writing by the Commissioner of Internal Revenue on the ground that the said transfers were made in contemplation of death and that the property so transferred had been properly included in decedent's gross estate under the provisions of Section 302(c) of the Revenue Act of 1926, as amended.

1220

XV

Helen Hall Vail was twice married. Her first husband was Charles F. Houghton, by whom she had three children: Florence, who died in infancy, Laura and MaBelle. Laura Houghton married Ieuan Harris, and had three children, John H. Harris, William R. Harris and David F. Harris. Laura Houghton Harris died on or about August 31, 1925, being survived by her husband and three children. The father, Ieuan Harris, was appointed General Guardian of the three children by the Surrogates Court of the County of Ontario, State of New York, and was so acting during the times herein mentioned.

1221

1222 *Findings of Fact and Conclusions of Law.*

MaBelle Houghton married Joseph H. Plumb, and is now known as MaBelle Houghton Plumb, and has one son, Joseph H. Plumb, Jr.

When adjudicated incompetent Mrs. Vail was 71 years of age and was suffering from an incurable ailment.

XVI

Allowances by Mrs. Vail, prior to her being declared incompetent, to her daughters have never exceeded $6,000 per year to each. In 1912 she gave each $1,500; in 1913,
1223 $3,000; and since 1914 $6,000 annually. In addition, at one time she did give Mrs. Plumb $5,000, and to each of her two daughters a residence of considerable value.

Mrs. Vail never made any allowances to the issue of her daughter, Laura Houghton Harris, either prior or subsequent to the death of the said Laura Houghton Harris on August 31, 1925.

XVII

The amounts of the estate of Mrs. Vail in 1912 was large. It had been accumulated from 1897 when her first husband died.

1224

XVIII

For the five years preceding the adjudication that Mrs. Helen Hall Vail was incompetent, the average annual income from the trust was $318,000.

XIX

Subsequent to her adjudication, the incompetent's income increased on the average annually not to exceed 25 per cent over the average of the preceding five years. By the order of January 14, 1927, the allowances to the daughter, MaBell Houghton Plumb, was jumped from

1225

$6,000 to $50,000 per year or 800 per cent, and the allowance to the issue of Laura Houghton Harris was jumped from 0 to $50,000.

XX

No allowances were ever made by Mrs. Vail to collateral heirs, except to Mrs. Ferris to whom an allowance of $500 annually was paid.

XXI

Neither the petition of 1926 nor that of 1932 show, 1226
nor was any proof offered in support thereof to show the need of any allowance to any of the direct or collateral heirs. The petition of 1932 shows no need of any allowance to any of the direct heirs and does not mention the collateral heirs.

XXII

The Referee in the 1926 proceeding recommended an allowance of $50,000 to the General Guardian of the Harris children to be applied by him to their "maintenance and support." During this period the father of these children had an annual gross income of $200,000. 1227

XXIII

The records of the proceedings in 1926 and 1932, specifies the intent and parpose to equalize allowances to direct heirs so that each would share equally in the estate of the incompetent upon her death.

XXIV

The increase in the allowance in 1932 was a gift made in anticipation of succession to the estate by MaBell

1228 *Findings of Fact and Conclusions of Law.*

Houghton Plumb and the children of Laura Houghton Harris the only direct heirs of the incompetent.

XXV

The making of the retroactive allowances aggregating $250,000 was a means of distributing part of the incompetent's estate in anticipation of her death.

XXVI

A substantial part of this estate was withdrawn by
1229 these allowances. The amount, as heretofore stated, was $1,377,866.67.

XXVII

In the proceedings by which the allowances were made to MaBelle Houghton Plumb and others by the Supreme Court of the State of New York, New York County, Mrs. Plumb stipulated that the ultimate amount she should receive from the estate of the incompetent on the death of the incompetent should not exceed that to be paid the General Guardian on account of the Harris children; and these allowances were characterized in the
1230 stipulations as "advancements."

XXVIII

All sums of money paid to MaBelle Houghton Plumb and Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, Helen Hall Vail, and to Edward Hegeman Hall, Mary Hall Taft, Elizabeth Hall Burdick, Abbe Ferrin and Lucy Hall Ferris, by the Committee of the property of Helen Hall Vail, pursuant to the order entered by Honorable Richard P. Lydon, Justice of the Supreme Court of the State of New York, on

January 14, 1927, and pursuant to the order entered by Hon. Phoenix Ingraham, Justice of the Supreme Court of the State of New York, on June 3, 1932, were motivated by the same considerations that lead to, and were intended as, testamentary dispositions of the property and the estate of the incompetent and were transfers made in contemplation of death and in anticipation of the succession to the estate of said incompetent, save and except the sum of $6,000 paid annually to MaBelle Houghton Plumb and Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and except the sum of $500 paid annually to Lucy Hall Ferris.

Conclusions of Law

I

The gifts made by the incompetent, acting through the Supreme Court of the State of New York, in excess of $6,000 annually to MaBelle Houghton Plumb and Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and in excess of $500 annually made to her sister, Lucy Hall Ferris, were made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended by Section 803(a) of the Revenue Act of 1932, now Section 811(c) of the Internal Revenue Code.

II

Plaintiff has not established by a fair preponderance of the evidence that the gifts made by the incompetent acting through the Supreme Court of New York in excess of $6,000 annually to MaBelle Houghton Plumb and

1234 *Findings of Fact and Conclusions of Law.*

Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and in excess of $500 annually made to her sister, Lucy Hall Ferris, were not made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended by Section 803(a) of the Revenue Act of 1932, now Section 811(c) of the Internal Revenue Code.

III

1235

Defendant, upon the facts and the evidence, is entitled to judgment dismissing plaintiff's complaint except that the parties have stipulated and agreed that the plaintiff is now entitled to judgment under the decision of this Court after credit for payment of additional State Inheritance Taxes to the States of New York and Florida, respectively, in the sum of $54,100.24, with interest thereon at the rate of 6 per cent (6%) per annum from the twenty-second of June, 1938.

IV

1236

That the plaintiff have and recover from the defendant costs in this action.

That Judgment Be Entered Accordingly.

John Knight
United States District Judge.

Stipulation as to Amount of Judgment.

1237

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties to the above entitled action that the estate tax liability of the plaintiff, as Administrator of the goods, chattels and credits of Helen Hall Vail, deceased, was computed by the Commissioner of Internal Revenue, after giving effect to the decision of this Court filed herein on February 25, 1942, and after giving the estate credits for gift tax paid, in the sum of $52,276.15, and State inheritance taxes paid, aggregating $158,368.82, against total assessments, with interest, made by the Commissioner of Internal Revenue against the estate, aggregating $1,008,922.38, and an overpayment was determined by the Commissioner in the sum of $54,100.24, and

1238

IT IS FURTHER STIPULATED AND AGREED that the aforesaid overpayment, as set forth in the Schedule hereto annexed and made a part hereof, was made by the plaintiff to the defendant on June 22, 1938, and that this stipulation and the said Schedule, so annexed and made a part hereof, shall be incorporated in and made a part of the record in this case, and

1239

IT IS FURTHER STIPULATED AND AGREED that the judgment to be entered by the Court in this action shall provide that plaintiff recover of the defendant the sum of $54,100.24, with interest thereon at the rate of 6% per

1240

annum from June 22, 1938, together with the lawfully taxed costs of this action.

Dated: Buffalo, New York, May 14, 1943.

MONTGOMERY, GRACE & DERBY,
Attorneys for Plaintiff.

GEORGE L. GROBE,
GEORGE L. GROBE,
United States Attorney in and for
1241 the Western District of New York,
Attorney for Defendant.

SCHEDULE

MT-ET-4169-28th New York
Estate of Helen Hail Vail
Date of death—December 27, 1935

RECOMPUTATION OF ESTATE TAX LIABILITY IN ACCORDANCE WITH THE MEMORANDUM OF THE CHIEF COUNSEL, DATED NOVEMBER 12, 1942

1242

Net estate previously determined (1926 Act)		$3,196,070
Net estate previously determined (1932 Act)		3,256,070
Less:		
Payments allowed as distribution in accordance with the decision of the District Court for the Western District of New York (9 years at $12,500.00)	$112,500.00	
Net estate as adjusted (1926 Act)		$3,083,570
Net estate as adjusted (1932 Act)		3,143,570

Stipulation as to Amount of Judgment.

Amount assessed on return..	419,616.73			
Assessed pursuant to waiver	436,031.67			
Interest	30,880.60			
Assessed by Bureau.....	104,674.68			
Interest	17,718.70			
Total Assessments		$1,008,922.38		
Assessed but not paid.....		122,393.38		
Assessed and paid.....			886,529.00	
Gross basic tax (1926 Act)..	248,528.51			
Credit for gift tax.....	43,663.05			
	204,865.46			
Credit for State estate, inheritance, legacy or succession taxes	158,368.82			
Net tax (1926 Act).....		46,496.64		
Total gross tax (1926 and 1932 Acts) $1,015,771.21				
Gross tax (1926 Act).....	248,528.51			
Gross additional tax (1932 Act)	767,242.70			
Credit for gift tax.....	8,613.10			
Net additional tax.....		758,629.60		
Net tax due (adjusted).....		805,126.24		
Interest		27,302.52		
Correct net tax due.....			832,428.76	
Overpayment			$ 54,100.24	

1246

Judgment.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

This action having been duly brought to trial before the Honorable John Knight, United States District Judge, at a Term of this Court, held in the Court House thereof,
1247 Niagara Square, Buffalo, New York, on the 6th day of May, 1941, and the cause having been presented to the Court without the intervention of a jury, and the trial having been continued to May 7, 1941, by order of the Court, and the Court, on May 14, 1943, having made and entered its Findings of Fact and Conclusions of Law, and the parties hereto having entered into a stipulation made May 14, 1943, hereto annexed and specifically made a part hereof, that the plaintiff is entitled to judgment under the decision of this Court after credit for payment of additional State inheritance taxes to the States of New York and Florida, respectively, in the sum of
1248 $54,100.24, together with interest thereon from the 22nd day of June, 1938, at the rate of 6% per annum, plus costs and disbursements, and the costs of the plaintiff having been taxed herein at $301.03,

NOW, THEREFORE, it is

ADJUDGED that the plaintiff, City Bank Farmers Trust Company, as administrator of the goods, chattels and credits of Helen Hall Vail, deceased, recover of the defendant, George T. McGowan, United States Collector of Internal Revenue for the Twenty-eighth Collection Dis-

1249

trict of New York, the sum of $54,190.24, together with interest thereon from June 22, 1938, at the rate of 6% per annum, and the sum of $301.03, costs and disbursements as taxed as aforesaid.

Dated: May 14, 1943.

Enter,

JOHN KNIGHT,
U. S. D. J.

1250

MAY C. SICKMON,
Clerk of the United States District Court,
for the Western District of New York.

1251

1252 **Certificate of Probable Cause.**

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in this action having been duly brought to trial before the Hon. John Knight, United States District Judge, at a Term of this Court, held in the Court House thereof, Niagara Square, Buffalo, New York, on
1253 the 6th day of May, 1941, and the parties having waived a trial by jury by not making demand therefor and thereby consenting to the trial and determination of the cause by the Court without a jury, and the trial having been continued to May 7, 1941, by order of the Court, and all the parties having appeared and the Court having heard the allegations, proofs, and arguments of the respective parties, and due deliberation having been had and judgment against the defendant having been entered herein on May 14th, 1943, in the amount of $54,100.24, with interest thereon from June 22, 1938, as required by law, together with costs in the sum of $301.03.

1254 NOW, THEREFORE, pursuant to Revised Statutes, Section 989 (Title 28, U. S. C. Section 842), I hereby certify that there was probable cause for the acts done by the defendant as Collector of Internal Revenue that resulted in a judgment against him.

Dated: Buffalo, New York, May 14th, 1943.

JOHN KNIGHT,
U. S. D. J.

CONSENT is hereby given to the entry of the foregoing.

MONTGOMERY, GRACE & DERBY,
Attorneys for the Plaintiff.

Notice of Appeal.

1255

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE IS HEREBY GIVEN that City Bank Farmers Trust Company, formerly known as The Farmers Loan and 1256
Trust Company, as Administrator of the goods, chattels and credits of Helen Hall Vail, deceased, the plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final judgment made and entered by the above entitled Court in the above entitled cause on the 14th day of May, 1943, in so far as the recovery awarded to the plaintiff is less than the sum demanded in the complaint.

Dated: August 9th, 1943.

MONTGOMERY, GRACE & DERBY,

1257

By JAMES LLOYD DERBY,

J. SEYMOUR MONTGOMERY, JR.,

Members of the firm

Attorneys for Plaintiff-Appellant, City Bank Farmers Trust Company, as Administrator of the goods, chattels and credits of Helen Hall Vail, deceased,

Office and P. O. Address:

One Cedar Street,

Borough of Manhattan,

City of New York, N. Y.

1258 *Notice of Appeal.*

PARTIES TO THE JUDGMENT APPEALED FROM:

Party

City Bank Farmers Trust Company, formerly known as The Farmers Loan and Trust Company, as Administrator of the Goods, Chattels and Credits of Helen Hall Vail, deceased, Plaintiff-Appellant,

George T. McGowan, Collector of Internal
1259 Revenue for the Twenty-eighth Collection District, New York, Defendant-Appellee.

Name and Address of Attorney

MONTGOMERY, GRACE & DERBY,
One Cedar Street,
New York 5, N. Y.

GEORGE L. GROBE,
United States Attorney
in and for the Western
1260 District of New York,
United States Court House,
Buffalo, New York.

Plaintiff-Appellant's Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal. 1261

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

1262

Comes now the Plaintiff-Appellant in the above entitled case and designates the following portions of the record, proceedings and evidence to be included in the Record on Appeal to the United States Circuit Court of Appeals for the Second Circuit:

I. The complaint.

II. Defendant's motion to dismiss the complaint, entered August 7, 1939.

III. Order of January 2, 1940, denying motion to dismiss complaint.

IV. Opinion thereon of Judge John Knight, dated December 21, 1939. 1263

V. The answer.

VI. Plaintiff's notice of April 24, 1941, to admit facts.

VII. Affidavit of Assistant U. S. Attorney Robert M. Hitchcock of April 28, 1941, pursuant to Rule 36 of Federal Rules of Civil Procedure.

VIII. Transcript of the proceedings, excluding the matter which follows line 4 of page 32 through page 132 of said transcript.

1264 *Plaintiff-Appellant's Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal.*

IX. Plaintiff's exhibits, as follows:

Plaintiff's Exhibit No. 1—Appraiser's report, taxing order, receipt for tax, New York State Transfer Tax Return.

Plaintiff's Exhibit No. 2—Certificate of no appeal.

1265 Plaintiff's Exhibit No. 3—Certified copy of Letters of Administration.

Plaintiff's Exhibit No. 5—Inquisition.

Plaintiff's Exhibit No. 6—Order of New York Supreme Court of August 12, 1926, appointing Committees.

Plaintiff's Exhibit No. 7—Commission to Committees, dated August 25, 1926.

Plaintiff's Exhibit No. 9—Petition of MaBelle H. Plumb, verified October 8, 1926.

1266 Plaintiff's Exhibit No. 10—Answer and cross-petition of the Farmers Loan and Trust Company, Committee of the Property, dated November 19, 1926.

Plaintiff's Exhibit No. 14—Testimony before Referee Philip J. Dunn.

Plaintiff's Exhibit No. 15—Report of Referee.

Plaintiff's Exhibit No. 16—Order of New York Supreme Court of January 14, 1927, granting allowances. (NOTE: This order is annexed to the Complaint as Exhibit "A".)

Plaintiff-Appellant's Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal. 1267

Plaintiff's Exhibit No. 17—Petition of MaBelle H. Plumb, verified April 26, 1932.

Plaintiff's Exhibit No. 19—Answer of City Bank Farmers Trust Company, Committee of the Property, verified May 2, 1932.

Plaintiff's Exhibit No. 21—Answer of Ieuan Harris as General Guardian, verified May 5, 1932. 1268

Plaintiff's Exhibit No. 23—Order of New York Supreme Court of May 4, 1932, appointing Special Guardian and Referee.

Plaintiff's Exhibit No. 26—Testimony before Referee Townsend Morgan.

Plaintiff's Exhibit No. 28—Report of Referee.

Plaintiff's Exhibit No. 29—Order of New York Supreme Court of May 31, 1932, amending title and prayer of petition.

Plaintiff's Exhibit No. 30—Order of New York Supreme Court of June 3, 1932, granting allowances. (NOTE: This Exhibit is annexed to the Complaint as Exhibit "B".) 1269

Plaintiff's Exhibit No. 31—Report of Special Guardian Cornelius J. Smyth.

Plaintiff's Exhibit No. 32—Intermediate account of Committee of the Property. (NOTE: Only pp. 1 to 6, inclusive, being the preamble, and all of Schedule F-3, showing allowances paid, to be included.)

1270 *Plaintiff-Appellant's Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal.*

Plaintiff's Exhibit No. 33—Supplemental intermediate account of Committee of the Property. (NOTE: Only pp. 1 to 3, inclusive, being the preamble, and all of Schedule F-3, showing allowances paid, to be included.)

Plaintiff's Exhibit No. 35—Judgment of New York Supreme Court of February 20, 1934,
1271 settling intermediate account.

Plaintiff's Exhibit No. 36—Final account of Committee of the Property. (NOTE: Only pp. 1 to 7, being the preamble, and all of Schedule G, showing allowances paid, to be included.)

Plaintiff's Exhibit No. 37—Final order of New York Supreme Court of December 9, 1936, settling final account.

Plaintiff's Exhibit No. 38—Federal estate tax
1272 return.

Plaintiff's Exhibit No. 39—Claim for refund.

Plaintiff's Exhibit No. 40—Letter from Commissioner of Internal Revenue, dated November 3, 1937.

Plaintiff's Exhibit No. 41—Letter from Commissioner of Internal Revenue, dated April 5, 1938. (NOTE: This exhibit is annexed to the complaint, marked "Exhibit D".)

Plaintiff's Exhibit No. 43—Letter of Commissioner of Internal Revenue, dated July 28, 1938, rejecting claim for refund.

Plaintiff-Appellant's Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal. 1273

X. Opinion of the Court.

XI. Findings of fact and conclusions of law.

XII. Stipulation of May 14, 1943, as to amount of judgment.

XIII. The judgment.

XIV. Certificate of probable cause.

XV. Notice of appeal. 1274

XVI. Plaintiff-Appellant's designation of the portions of the record, proceedings, and evidence to be contained in the Record on Appeal.

XVII. Statement of points relied upon by Plaintiff-Appellant.

Dated: August 9th, 1943.

MONTGOMERY, GRACE & DERBY,
By JAMES LLOYD DERBY,
J. SEYMOUR MONTGOMERY, JR.,
Members of the firm 1275
Attorneys for Plaintiff-Appellant, City Bank Farmers Trust Company, as Administrator of the goods, chattels and credits of Helen Hall Vail, deceased,
Office & P. O. Address:
One Cedar Street,
Borough of Manhattan,
City of New York, N. Y.

1276 *Plaintiff-Appellant's Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal.*

To:

GEORGE L. GROBE, ESQ.,
United States Attorney in and for the
Western District of New York,
Attorney for Defendant-Appellee,
502 United States Court House,
Buffalo, New York.

1277 MAY C. SICKMON,
Clerk of the United States District Court
for the Western District of New York.

1278

Stipulation Amending Designation of Record. 1279

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

Civil 131

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the Goods, Chattels and Credits of HELEN HALL VAIL, deceased, 1280

Plaintiff,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-eighth Collection District, New York,

Defendant.

The Plaintiff-Appellant herein, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, having duly 1281 served upon the Defendant-Appellee its Designation of the portions of the record, proceedings and evidence to be contained in the Record on Appeal herein, and the Defendant-Appellee not having within the time required by said rule filed or served a designation of additional portions of the record, proceedings and evidence to be included in said Record on Appeal, and the said Plaintiff-Appellant having inadvertently failed in designating the portions of said record, proceedings and evidence to eliminate certain irrelevant material constituting part of Plaintiff's Exhibits 1 and 38,

1282 *Stipulation Amending Designation of Record.*

Now, in order to comply with Rule 75(e) of said Federal Rules of Civil Procedure, which requires the omission of all irrelevant and formal portions of documents,

IT IS HEREBY STIPULATED by and between the attorneys for the Plaintiff-Appellant and the attorneys for the Defendant-Appellee that the Plaintiff-Appellant's said Designation of the portions of the record, proceedings and evidence to be contained in the Record on Appeal herein dated August 9, 1943, be and the same hereby is amended
1283 to the following extent.

Item IX thereof shall be and is hereby amended to read as follows:

"IX. Plaintiff's Exhibits, as follows:

Plaintiff's Exhibit No. 1—(1) Total amounts of Schedules A, B and C of the New York estate tax return (2) Schedule E of New York estate tax return; (3)

'RECAPITULATION' from report of New York estate tax appraiser dated June 27, 1936; (4)
1284 Order of Surrogate's Court, Ontario County, New York, determining decedent's gross and net estates and fixing tax.

* * * * * *

Plaintiff's Exhibit No. 38—(1) Schedule E of Federal estate tax return (omitting printed instructions); (2) Schedule L of Federal estate tax returns; (3) Schedule M of Federal estate tax return; (4) Schedule N of Federal estate tax return; (5) 'Computation of Tax' of Federal estate tax return; (6) 'General Information' of Federal estate tax return."

Stipulation Amending Designation of Record. 1285

AND IT IS HEREBY FURTHER STIPULATED that except as hereinabove expressly amended, the Plaintiff-Appellant's said Designation of the portions of the record, proceedings and evidence to be contained in the Record on Appeal herein shall remain in full force and effect.

AND IT IS HEREBY FURTHER STIPULATED that the said Record on Appeal herein shall consist of the record, proceedings and evidence designated in the Plaintiff-Appellant's said Designation of the portions of the record, proceedings and evidence to be contained in the Record on Appeal herein as hereby amended. 1286

Dated: September 30, 1943.

MONTGOMERY, GRACE & DERBY,
Attorneys for Plaintiff-Appellant.

SAMUEL O. CLARK, JR.,
Attorneys for Defendant-Appellee.

1287

1288 **Statement of Points.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

Comes now the plaintiff-appellant in the above entitled case and files the following Statement of Points, relied
1289 upon by the plaintiff-appellant for reversal of the judgment entered in said case by the United States District Court for the Western District of New York on the 14th day of May, 1943:

(1) The Court erred in holding that the payments of the allowances granted by the order of the Supreme Court of the State of New York, dated January 14, 1927, were transfers in contemplation of death within the purview of Section 302 (c) of the Revenue Act of 1926, as amended, and as such subject to the estate tax imposed by the said Act.

1290

(2) The Court erred in holding that the payments of the allowances granted by the order of the Supreme Court of the State of New York, dated June 3, 1932, were transfers in contemplation of death within the purview of Section 302 (c) of the Revenue Act of 1926, as amended, and as such subject to the estate tax imposed by said Act.

(3) The Court erred in ascribing a testamentary motive or purpose within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended, to the order of the Supreme Court of the State of New York dated January

14, 1927, granting allowances out of the surplus income of the incompetent to her daughter, MaBelle H. Plumb, and to Ieuan Harris as General Guardian of her grandsons, John H. Harris, William R. Harris and David F. Harris to the extent that the said order directed payments to them in excess of $6,000 per annum.

(4) The Court erred in ascribing a testamentary motive or purpose within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended, to the order of the Supreme Court of the State of New York dated June 3, 1292
1932 granting allowances out of the surplus income of the incompetent to her daughter, MaBelle H. Plumb, and to Ieuan Harris as General Guardian of her grandsons, John H Harris, William R. Harris and David F. Harris to the extent that the said order directed payments to them in excess of $6,000 per annum.

(5) The Court erred in holding that a testamentary motive within the meaning of Section 302 (c) of the Revenue Act of 1926 and its amendments is to be imputed to court orders directing payments out of the surplus income of the incompetent to her next of kin for the reason 1293
that such payments anticipated intestate succession.

(6) The Court erred in holding that a testamentary motive within the meaning of Section 302 (c) of the Revenue Act of 1926, and its amendments, is to be imputed to court orders directing payments out of the surplus income of the incompetent to her collateral relatives for the reason that such payments anticipated intestate succession, even though such collaterals were not entitled to take by intestacy.

(7) The Court erred in holding that the evidence and the records of proceedings in the Supreme Court of the

1294 *Statement of Points.*

State of New York support the determination of the Commissioner of Internal Revenue that the allowances paid pursuant to the orders of January 14, 1927 and June 3, 1932 to next of kin of the incompetent were testamentary in character, in that there was no evidence in the records, and the Court made no finding, that such allowances were designed or intended to evade inheritance taxes.

(8) The Court erred in holding that the evidence and the records of proceedings in the Supreme Court of the
1295 State of New York support the determination of the Commissioner of Internal Revenue that the allowances paid pursuant to the orders of January 14, 1927 and June 3, 1932 to certain persons other than the next of kin of the incompetent were testamentary in character, in that there was no evidence in the records, and the Court made no finding, that such allowances were designed or intended to evade inheritance taxes.

(9) The Court erred in holding that the allowances were transferred in contemplation of death since, inasmuch as they were directed to be paid out of surplus, spendable income, and only for so long as the incom-
1296 petent continued to live, the transfers were not in the nature of substitutes for testamentary dispositions such as Congress intended to reach and tax by Section 302(c) of the Revenue Act of 1926, as amended.

(10) The Court erred in holding that although the New York Supreme Court was without jurisdiction to make a testamentary disposition of the property of an incompetent person, the Commissioner of Internal Revenue was not foreclosed from attributing to the orders of January 14, 1927 and June 3, 1932 granting allowances, a testamentary motive within the meaning of Section 302(c) of the Revenue Act of 1926, as amended.

Statement of Points. 1297

(11) The Court erred in rejecting evidence of the judgments of the Supreme Court of the State of New York, dated February 20, 1934 and December 9, 1936, by which the accounts of the City Bank Farmers Trust Company which embraced payments of the allowances directed by orders of said Court dated January 14, 1927 and June 3, 1932 were approved and settled.

Dated, August 9th, 1943.

1298

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MAY C. SICKMON,
Clerk of the United States District Court
for the Western District of New York.

1300

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED, that the foregoing printed record contains a full, true and correct record of the said District Court in the above entitled action necessary for the determination of the appeal herein, as agreed on by the parties, and that the Clerk of the United States District Court for the Western District of New York may certify the same without further comparison as and for a complete and true transcript of the Record on the Appeal in said case.

1301

Dated, ~~October 21~~ November 6, 1943.

MONTGOMERY, GRACE & DERBY,
Attorneys for Plaintiff

1302

SAMUEL O. CLARK, JR.,
Attorney for Defendant.

Clerk's Certificate. 1303

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

[SAME TITLE]

I, MAY C. SICKMON, Clerk of the District Court of the United States of America, for the Western District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said district Court in 1304 the above entitled action, as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said District Court to be hereunto affixed at the City of Buffalo, in the Western District of New York, this 9th day of November in the year of our Lord, one thousand nine hundred and forty-three, and of the Independence of the United States, the one hundred and sixty-ninth. (Seal)

May C. Sickmon

Clerk. 1305

Time for filing record extended to November 20, 1943 by order of Clerk of C.C.A. Dated Nov. 1, 1943 & filed in District Court Nov. 3, 1943

May C. Sickmon
Clerk U.S.D.C.

Press of Fremont Payne, Inc.
(28370)

[fol. 436] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 228

October Term, 1943.

(Argued March 30, 1944 Decided May 10, 1944.)

CITY BANK FARMERS TRUST COMPANY, as Administrator, Appellant,

v.

GEORGE T. McGOWAN, Collector, Appellee

BEFORE: L. HAND, SWAN and CHASE, *Circuit Judges*

Appeal by the plaintiff, as administrator, from so much of a judgment of the District Court for the Western District of New York, as denied a part of its claim to recover the amount paid by it as the estate tax of its intestate.

J. Seymour Montgomery, Jr., for the appellant.
Carlton Fox, for the appellee.

[fol. 437] L. HAND, *Circuit Judge*:

The plaintiff is the administrator of Helen Hall Vail, a deceased incompetent; it sued to recover the amount which it had paid to the defendant, as collector, as an estate tax levied on her estate. The judgment allowed part of the claim and denied the rest; and the plaintiff appeals from the denial. The facts were as follows. Helen Hall Vail, the intestate, was declared incompetent by the Supreme Court of New York, where she lived, in August, 1926; and the plaintiff was appointed a committee of her property. She was then a widow, over seventy years old and incurably insane. Her next of kin were a daughter and three infant children of a dead daughter who lived with their father. She owned real estate in Geneva, New York, Palm Beach, Florida, and New Jersey; and including accumulations of past income, she had personal property, of about $1,000,000. Besides, she was the life beneficiary of a trust in her favor created by her first husband, the income from which was about $300,000 a year; and her income from all sources in-

cluding this was about $350,000. On October 8, 1926, her daughter petitioned the New York court to direct the plaintiff, as committee, to pay annually to certain named persons reasonable allowances out of the incompetent's surplus income, and the court referred the petition to a referee to hear testimony. The referee found that the utmost amount necessary for the incompetent's support, including the payment of taxes, would "fall far short of the sum of $50,000 per annum" and that there would remain "a balance of income of over $250,000," and recommended certain allowances. The court confirmed the report and directed the plaintiff to pay to the daughter annually $50,000, and to the guardian of the grand-children the same amount. It also directed the plaintiff to pay $2,000 a year to a brother, $2,000 to each of three sisters, and $3,000 to a [fol. 438] fourth sister. On April 26, 1932, the daughter petitioned the court for an increased allowance; and this petition was referred to another referee. He heard testimony and recommended that the allowances to the daughter and to the grand-children be increased by $25,000, and these increases should be paid retroactively. The court confirmed his report and entered an order to that effect. Under both these orders the plaintiff, as committee, paid out of surplus income the specified amounts until the death of the incompetent on December 27, 1935. The aggregate of these payments the commissioner included in the incompetent's estate on the ground that they were made in contemplation of death under §302(c) of the Revenue Act of 1926. The district judge held that all the payments were part of the incompetent's estate except $6,000 of the annual payments to the daughter, $6,000 of those to the grandchildren, and $500 of those to one of the sisters. His reasons for making these exception were that the gifts pro tanto "were motivated by the same motive which would have led the incompetent, Helen Hall Vail, to make payments in these amounts to these respective parties." Between the year 1914 and August 1926, when the incompetent was adjudged incompetent, she had given $6,000 annually to her two daughters, and $500 annually to the sister in question.

Section 302(c) of the Revenue Act of 1926 covers "any interest * * * of which the decedent has at any time made a transfer * * * in contemplation of * * * death." The payments at bar were not made by the dece-

dent, so that literally, the words do not apply. Nevertheless, the property was transferred, for the law gave the judges power to transfer it. The first question therefore is whether we should hold that the section covers such payments in case they are made "in contemplation of death," a question which we may reserve for the moment. We are satisfied that the proper construction of the section is as though it read: "any interest * * * of which at any [fol. 439] time a transfer has been made from the decedent in contemplation of death." We have no doubt that if Congress had been faced with a situation like that before us, it would have included payments made by the court out of the property of an incompetent; to hold otherwise would be to frustrate the plain purpose of the section. Moreover, that once granted, the intent of the court must control in deciding whether the payments were made "in contemplation of death," for obviously the incompetent herself could have no intent of any kind. The judges' intent was to make such gifts as the incompetent would have made, if she had been competent, so the orders said; but that cannot have meant such gifts as she would have made, had she been not only competent, but expecting to continue competent until she died. It must have meant such gifts as she would have made, if for the moment lucid, but with the prospect of imminent incompetency before her. There can be no doubt as to this, for the judges had no evidence whatever from her past conduct for supposing that, if she had looked forward to ending her life in full possession of her faculties, she would have given away every year to her daughter, her grandchildren and her brother and sisters, more than $160,000 out of the $250,000 which remained to her after paying her taxes and expenses. The allowances she had theretofore made did not remotely approach such figures.

Little has been added by the Supreme Court to what was said as to the phrase, "in contemplation of death," in *United States* v. *Wells*, 283 U. S. 102, which remains our authoritative guide. The only other decisions of that court which can be said to throw any light upon it are *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, overruled on another point in *Helvering* v. *Hallock*, 309 U. S. 106; and *Colorado National Bank* v. *Commissioner of Internal Revenue* 305 U. S. 23 and neither of these professes to modify the doctrine as there laid down. Its outlines were indeed

[fol. 440] not sharp, or intended to be sharp, but some things are clear. Such a gift need not be in contemplation of imminent death; the section applies to gifts made by the young and healthy, as well as by the old and infirm. It covers "substitutes for testamentary dispositions." If they are such "substitutes," the test is the donor's motive, which "must be of the sort which leads to testamentary disposition" (p. 147). Moreover, even though they be "substitutes" and the motive be of that "sort," the donor must not be also actuated by a "dominant" motive of some other kind, which was left vague then, and has not yet been defined. Among such motives apparently is the desire to accustom the donee to the management and responsibility of property, *United States* v. *Wells*, *supra*, 283 U. S. 102), the desire to make him independent, or to keep down the donor's surtaxes on his income (*Becker* v. *St. Louis Trust Co.*, *supra*, 296 U. S. 48, 52), the desire to escape the possible consequences of the donor's own speculations (*Colorado National Bank* v. *Commissioner*, *supra*, 305 U. S. 23, 26). Thus, if the gift be a "substitute" for a "testamentary disposition," and if the only motive be a desire to anticipate the benefit which the donee will eventually get by such a disposition, it might seem to follow inevitably that it is made "in contemplation of death." Yet, if that be true, every present gift, actuated by an undifferentiated desire to benefit the donee, is a gift "in contemplation of death," if only it is made to a person to whom the donor would have left the property on his death. In that event the gift tax covers only gifts which are not "substitutes for testamentary dispositions," and gifts, which, though they are such substitutes, are made with some "dominant" purpose of the specific character which takes a gift out of the section. Possibly that may be the law, but certainly it has not yet been clearly so declared.

We are not however confronted with that question here, because the gifts at bar were "substitutes for testamentary [fol. 441] dispositions" in a much more complete sense than the ordinary present gift inter vivos. First, they were made by one who could not enjoy the income during her life, but who must let it roll up and pass upon her intestacy. In *Farmers Loan & Trust Co.* v. *Bowers*, 68 Fed. (2) 916; 98 Fed. (2) 794 (C. C. A. 2)—"*The Astor Trusts Case*,"—for example, the donor had reserved to himself $150,000 annually out of the income of each trust which substantially

exhausted it, so that all that he really gave to his sons was in substance remainders after his death. That was as complete a substitute for a testamentary disposition as it was possible for a gift to be and still be a gift at all. We do not forget that the gift of a remainder is not one "intended to take effect in possession and enjoyment" at the donor's death. *May* v. *Heiner*, 281 U. S. 238. Nor do we mean that a gift to a person who would receive it upon the donor's death is inevitably a gift "in contemplation of death," whenever the donor reserves the income to himself for life. If the donor has a specific "dominant" motive of the required kind, such a gift will be excluded. But in determining whether a gift is one "in contemplation of death" an extremely weighty consideration is that by reserving the income to himself for life, the donor has so closely assimilated the gift to a testatmentary disposition. In *The Astor Trusts Case*, *supra*, that fact was, it is true, coupled with the donor's other, and perhaps "dominant," motive—to escape an estate tax—but that was not among those which the court will recognize.

Moreover, the facts in the case at bar are even stronger than if a sane person had reserved the income to himself and given away only a remainder to those who would in due course have received it anyway. Such a person has had power to dispose of the remainder before he makes the gift, a power of which the gift deprives him. But an incompetent has no such power, and any gift made on his be- [fol. 442] half deprives him of nothing; he is an inert conduit of the property to his next of kin, or to his legatees, if he has made a will while sane. It is true that in the case at bar the judges were authorized to act, and did act, for the incompetent, so that the incompetent is not to be deemed jurally impotent if this vicarious power can be imputed to her. But even if it can be, that power was very limited; as we ha[illegible] seen, it was confined to such gifts as she would have made, had she in a lucid interval contemplated her unhappy prospect. They had the choice of letting the surplus roll up, or of disposing of it as she would have disposed of it in such an interval, and as to the bulk of it they chose the daughter and grandchildren as donees, who were sure to take anyway. There could be no more complete "substitution" of a gift for a "testamentary"—in this case an intestate—"disposition" than that. Perhaps it still would not have been within the section, if the judges had made the allow-

ances in order to set up the donees in business, or something of the kind, but they did nothing of the sort. Indeed, upon the hearings before the referees the testamentary purpose was very frankly made plain, as the following excerpts from the remarks of counsel show. At the first hearing: "The granting of these allowances will only affect the persons who are applying for them, and they will eventually get the property upon Mrs. Vails' death." Again, "By granting these allowances the child and grandchildren will be simply getting now what they will eventually get in the end, with the exception of the small allowances asked for the brother and sisters of Mrs. Vail which they, the only persons interested in the estate are willing these sisters and brother should have." At the second hearing: "It is to me, not a matter of obtaining an allowance. It seems to be the idea of distributing part of this incompetent's property in anticipation more or less of her death." Again, "Where it is impossible for her to use it" (the income) "* * * [fol. 443] then the Court can make an advancement." And in accordance with this last suggestion the order provided that, so far as the payments to the daughter and the grandchildren might prove to be unequal, any excess given to one stirps should be regarded as an advancement in the distribution of the estate on intestacy, and should be charged against that stirps.

It is true that the allowances made to the brother and the sisters were not substitutes for that disposition of the property which would otherwise have taken place; on the contrary they diverted the money from those who would otherwise receive them. And yet it seems to us that it is enough to carry them along with the allowances to the daughter and grandchildren that the property transferred was beyond any power of the donor to enjoy, as were the remainders in *The Astor Trust Cases;* and that it was in addition beyond her individual power of disposition. Although they were not substitutes for the inevitable devolution of the property had they not been made, they were certainly testamentary in their character, and they were actuated by a motive of the sort that leads to testamentary dispositions. With less confidence as to these, we hold that they were also gifts "in contemplation of death" within 302(c).

Judgment affirmed.

SWAN, Circuit Judge (dissenting):

The question presented by this apeal is whether quarterly payments made by the committee of an incompetent, pursuant to orders of the New York Supreme Court, to relatives of the incompetent during nine years preceding her death, are to be considered property "of which the decedent has at any time made a transfer by trust or otherwise, in [fol. 444] contemplation of * * * death", within the meaning of section 302(c) of the Revenue Act of 1926, Int. Rev. Code §811(c).

The statutory language as interpreted by Treasury Regulations [1] and by the opinions of the Supreme Court, clearly shows that the operative fact which brings the section into play is "the state of mind" or "motive" of the donor at the time of the transfer. The power of a court of chancery having charge of an incompetent's property to direct allowances out of the incompetent's surplus income has long been recognized by English law and by the law of New York. *Ex parte Whitbread*, 2 Mer. 99, 35 Eng. Rep. 878; *Matter of Willoughby*, 11 Paige 257; *Matter of Flagler*, 248 N. Y. 415. Jurisdiction in this field is conferred upon the New York Supreme Court by §1356 of the Civil Practice Act. Section 1357 of that Act declares that the court exercising jurisdiction over the property of an incompetent "must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for * * * the safe keeping and maintenance, and the education, when required, of the incompetent person and his family." As stated in *Matter of Flagler, supra*, at page 419, allowances out of the incompetent's surplus income are granted "upon the theory that the lunatic would, in all probability, have made such

[1] Art. 16, Treas. Reg. 80, says in part:

> "A transfer in contemplation of death is a disposition of property prompted by the thought of death. * * *
>
> As the phrase 'transfer in contemplation of death' is applicable to many varying transactions, the circumstances of each case must be examined to ascertain the motive which induced the decedent to make the transfer. If the transfer results from mixed motives, one of which is the thought of death, the more compelling motive controls. * * *"

payments if he had been of sound mind." In the case at bar the orders of the New York Supreme Court embodied findings that if the incompetent were in possession of her [fol. 445] mental faculties she would have made the allowances ordered by the court. It is against this background that the problem must be considered.

My brothers recognize that "obviously the incompetent herself could have had no intent of any kind" with respect to the allowances ordered by the state court. They then ascribe to her "the intent of the court"; not however, the intent expressed in the court's finding that she would have made the gifts, if competent, but an intent to make "such gifts as she would have made, if for the moment lucid, but with the prospect of imminent incompetency before her." This seems to me the veriest fiction. Fictions, of course, have frequently been employed in legal reasoning, but not so far as I am aware, to extend the coverage of a taxing act beyond its letter. In the words of Mr. Justice Sutherland in *Crooks* v. *Harrelson*, 282 U. S. 55, at 61, "the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness." It is true that the sums paid out pursuant to the state court orders decreased the amount of the incompetent's estate at death, and in so far as they were paid to her next of kin may perhaps be characterized as the "substitution" of a gift inter vivos for an "intestate disposition." But, as my brothers recognize, gifts to next of kin are not necessarily transfers in contemplation of death—it turns on the donor's dominant motive. *United States* v. *Wells*, 283 U. S. 102, 117. The allowances in question have been subjected to a gift tax under the Revenue Act of 1932. *City Bank Farmers Trust Co.* v. *Hoey*, 101 F. 2d 9 (C. C. A. 2). I am unable to find in the words of section 302(c) adequate language to subject them to the estate tax. Concededly the incompetent herself could not "contemplate" death. The state court which directed the payments to be made did not purport to make transfers in contemplation of death and had no [fol. 446] legal power to do so. It cannot make testamentary dispositions for the incompetent, N. Y. Civ. Prac. Act §1383; and in making allowances to his family it "does not do this because, if the lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate

* * *," but because "the court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done." Per Lord Eldon in *Ex parte Whitbread*, 2 Mer. 99, 102-3. Whether Congress would wish to impose an estate tax on gifts made out of an incompetent's surplus income by court order for the support and education of his family seems to me the merest surmise. At any rate, it has not said so in langauge justifying the courts in so holding. In my opinion the judgment should be reversed.

[fol. 447] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of May one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

CITY BANK FARMERS TRUST COMPANY, etc., HELEN HALL VAIL, Plaintiff-Appellant,

v.

GEORGE T. McGOWAN, Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 448] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. City Bank Farmers Trust Com-

pany, etc., v. George T. McGowan, Collector, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1944. Alexander M. Bell, Clerk.

[fol. 449] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 450] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

Petitioner,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

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GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on May 27, 1944, which judgment affirmed the judgment of the District Court of the United States for the Western District of New York, entered May 14, 1943.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Opinions Below

The opinion of the District Judge upon the trial of the case is printed at pages 387-400 of the Record and is reported in 43 Fed. Supp. 790.

The opinion of the Circuit Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Western District of New York, entered May 14, 1943 (R. 416), was handed down May 10, 1944, is printed at pages 436-444 of the Record and is reported in 142 F. (2d) 599.

Statutes and Regulations Involved

The pertinent statutes and regulations are printed in the Appendix, *infra*.

Question Presented

Whether allowances which were paid out of surplus income of an incompetent person, adjudged incapable of managing her person and affairs, by the Committee of her property, pursuant to orders of the New York Supreme Court, over a period of approximately nine years preceding her death, to various members of her family and comprising approximately 200 quarterly payments of allowance moneys for the benefit of these persons, were transfers made *by the decedent in contemplation of death* and, therefore, part of decedent's estate taxable under the Federal Estate Tax Law (Revenue Act of 1926, Sec. 302 (c), as amended; now Sec. 811 (c) of Internal Revenue Code).

Statement of the Case

This action was instituted in the District Court for the Western District of New York by the Administrator of the Estate of Helen Hall Vail for a refund of estate taxes alleged to have been illegally and erroneously assessed and

collected upon a deficiency assessment (R. 2-12). The question involved is that hereinbefore stated.

In 1926, the decedent, in a proceeding in the Supreme Court of the State of New York, was found to be incompetent (R. 78) and a Committee of the Property of the incompetent was appointed (R. 83). The incompetent lived until December 27, 1935 (R. 74), a period of some nine years; at no time did she recover her sanity.

The incompetent was a very wealthy woman. For the four or five years preceding the declaration of her mental incompetency her income had averaged over $300,000 per year (R. 171-172). Prior to her incompetency she had lived in great luxury (R. 149-150; 230-232) which she shared with her daughters (R. 226-227; 241-243; 305-306). In addition she had been in the habit over many years prior to her incompetency of making outright gifts to her children in substantial amounts (R. 134-135; 166; 169; 278).

In October, 1926, after Mrs. Vail had been declared incompetent, her daughter applied to the Supreme Court of the State of New York for an order directing the Committee of the Property to pay to the persons named in the petition annual allowances from the income of the incompetent to the extent that the Court might find such allowances would have been made by the incompetent had she been competent and mentally normal (Pl. Ex. 9, R. 54; 96-101), and not needed for the care and maintenance of the incompetent.

Hearings were held before a Referee (Pl. Ex. 14, R. 56; 106-160) and on the basis of the testimony and the findings of the Referee (Pl. Ex. 15, R. 56; 161-169) Hon. Richard P. Lydon, a Justice of the Supreme Court of the State of New York, entered an order (Pl. Ex. 16, R. 56; 170-174) which, among other things, found that to maintain and support the incompetent and care for her properly there could not reasonably be expended more than $50,000. a year and "that if the said incompetent Helen Hall Vail, were in the possession of her mental faculties and in all respects competent, she would desire the allowances hereinafter fixed to

be made to the persons hereinafter designated" (R. 172) and ordered the following annual allowances to be made to the following relatives of the incompetent from the income of the incompetent:

MaBelle Houghton Plumb, a daughter	$50,000.
Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren	$50,000.
Edward Hageman Hall, a brother	$ 2,000.
Mary Hall Taft, a sister	$ 3,000.
Elizabeth Hall Burdick, a sister	$ 2,000.
Abbe Ferrin, a sister	$ 2,000.
Lucy H. Ferris, a sister	$ 2,000.

(R. 172-173).

In 1932, after a further hearing in the Supreme Court of the State of New York (Pl. Ex. 26, R. 59; 191-270), the aforesaid allowances to the daughter and to the General Guardian of the three minor grandchildren of the incompetent were increased to the extent of $25,000 per annum, payable quarterly out of surplus income. This order further directed that these increased allowances be made retroactive to the extent of five and one-quarter years and paid out of the surplus income of the incompetent (Pl. Ex. 30, R. 60; 285-293).

The order of the State Court, dated June 3, 1932, contained findings that accumulated income in the hands of the Committee amounted to a sum in excess of $1,000,000, that the income of the incompetent for a period of five and one-half years prior thereto had averaged about $395,000 a year and the surplus income, after paying all expenses, including allowances theretofore granted by the order of the State Court of January 14, 1927, and paying all expenses on account of the incompetent for care and maintenance, had averaged about $191,000 per annum, and that if the incompetent had been in possession of her mental faculties and in all respects competent, she would have desired that the allowances fixed by said order of June 3,

1932 be made and would have made such annual allowances out of her income (R. 286-287).

In no instance was the principal of the incompetent's estate to be expended under any of these orders; and the annual allowances made to her relatives by these orders were payable only out of the income of the incompetent's estate to the extent that it was not used for her maintenance and support.

Over a period of approximately nine years the Committee of the Property, acting in pursuance of the orders of the Supreme Court of the State of New York, paid out of the incompetent's surplus income to the persons named in the orders, allowances which aggregated the sum of $1,377,886.67 (R. 26-34). There were in all approximately 200 quarterly payments of allowances to nine different individuals extending over a period of nearly nine years (R. 26-34). The Federal Gift Tax was paid on all amounts subject thereto paid after its effective date.

The aggregate of the payments made pursuant to orders of the State Court was included by the Commissioner in the incompetent's estate for Estate Tax purposes on the ground that the payments were made in contemplation of death. The tax thereon was paid and the Administrator in this action sued for a refund of that tax (R. 2-12).

The case was tried by the District Court, without a jury, which granted judgment in favor of the plaintiff to the extent of $54,100.24 and for the defendant as to the remainder of the amount sued for (R. 416-417) on the ground that it found that the allowances to the extent of $6,000. per annum to each branch of the family and of $500. paid annually to a sister of the incompetent were not made in contemplation of death but that the same allowances to the extent that they exceeded those amounts were made in contemplation of death and in "anticipation of the succession to the estate of the incompetent". This decision of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, with Swan, J., dissenting (R. 436-444).

Reasons for Granting the Writ

1. The Circuit Court of Appeals, one member of the Court dissenting, has decided an important question of law in a way probably in conflict with applicable local decisions.

2. The Circuit Court of Appeals, one member of the Court dissenting, has decided a Federal question, probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, decided by this Court.

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BRIEF AND ARGUMENT

I.

The Circuit Court of Appeals, one member of the Court dissenting, has decided an important question of law in a way probably in conflict with applicable local decisions.

The Supreme Court of the State of New York authorized the payment of allowances out of the surplus income of the incompetent in the exercise of statutory and chancery powers upon the theory that the incompetent would in all probability have made such payments if she had been of sound mind. Upon no other theory could the allowances be justified.

Matter of Flagler, 248 N. Y. 415 (1925).

There is a clearly defined limitation upon the jurisdiction or power of the New York Supreme Court in granting allowances out of incompetent persons' estates. The Court cannot make, authorize or direct a distribution of an incompetent's property, which is testamentary in character. No such power is conferred by statute, either expressly or by implication, and the rules laid down in the decisions of the New York Courts and the English Courts of Chancery expressly deny the existence of any such power.

Lewis v. *Jones*, 50 Barb. 645 (1868).

It is, however, a normal and well-established practice of the New York Supreme Court sitting in equity to direct allowances out of the surplus income of an incompetent person's estate, such as are involved in this case. It is a function which has been exercised by courts of equity since the early days of the English Chancery Courts. The practice has been carried on by the courts of New York from their earliest days down to the present time. The jurisdic-

tion of the New York Supreme Court in this field is conferred by statute (Sec. 1356 of the New York Civil Practice Act, printed in Appendix, *infra*) but its powers are exercised according to the well-established rules and practice of the Chancery Courts in lunacy cases—both in New York courts of equity and the English courts of chancery.

Pomeroy, Equity Jurisprudence, Vol. 1, 4th Ed. (1918), Sec. 385-n;
Matter of Blewitt, 131 N. Y. 541, 546 (1892);
Sporza v. *German Savings Bank*, 192 N. Y. 8 (1908);
In Re Andrews, 192 N. Y. 514 (1908);
Matter of Flagler, supra;
Parsee Merchant's Case, 11 Abb. Prac. N. S. 209, 219 (1871);
Ex Parte Whitbread, 2 Mer. 99; 35 Eng. Rep. 878 (1816);
Matter of Willoughby, 11 Paige 257 (1844);
Matter of Heeney, 2 Barb. Ch. 326 (1847).

In the State of New York, the leading case is *Matter of Flagler (supra)*, decided by its Court of Appeals. At p. 418 the Court stated in an opinion by Lehman, J.:

> "If Mrs. Flagler to-day could decide upon the disposition of the income of her great estate, moral or charitable considerations would dictate her decision only to the extent that she felt their force. Her great affluence might impel her to relieve the distress of her cousin; the law would not compel her to do so if she decided otherwise. The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incompetent. *In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them.* Allowances for the support of collateral relatives of the incompetent have been made 'upon the theory that the lunatic would, in all probability, have made such payments if he had been

of sound mind'. (*Matter of Lord*, 227 N. Y. 145.) The Appellate Division correctly held that the allowance made at Special Term may be justified upon no other theory. *Upon an examination of the record we find that the evidence leads logically to the conclusion that Mrs. Flagler, if sane, would to-day provide some relief for the petitioner.*" (Italics ours).

The Circuit Court of Appeals, however, has misapprehended and misapplied the law of the State of New York and held that:

"* * * the intent of the court must control in deciding whether the payments were made 'in contemplation of death' for obviously the incompetent herself could have no intent of any kind. *The judges' intent was to make such gifts* as the incompetent would have made, if she had been competent, so the orders said; but that cannot have meant such gifts as she would have made, had she been not only competent, but expecting to continue competent until she died. *It must have meant such gifts as she would have made, if for the moment lucid, but with the prospect of imminent incompetency before her.*" (R. 438) (Italics ours).

This theory ignores "*contemplation of death*" except as it may exist in the minds of the judges who made these orders and is wholly in conflict with the decisions of the New York Court of Appeals (*supra*), in that it substitutes the "*generous impulses*" of the Court for those which may be attributed to the incompetent upon "*an examination of the record*".

The result reached by the Circuit Court of Appeals is in obvious conflict with the New York decisions, because on the "lucid interval plus imminent insanity" theory which it formulated, and which Judge Swan in his dissenting opinion characterized as the veriest fiction (R. 443), the New York Courts would be free to give away all an incompetent's property, save perhaps what might be required for his maintenance and support. This is not the law of New York.

The New York courts have no power to make any allowances out of the income of an incompetent on the theory that he is permanently insane. The property of such a person must be managed on the assumption that he may recover sanity. This is the whole purpose of the conservation machinery set up by the law of New York.

As Lord Eldon said in *Ex parte Whitbread, supra*, at page 102:

> "Nevertheless, the Court in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin.
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> * * * * *
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> But the Court does not do this because, if the lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate, or necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.
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>
> * * * and if we get to the principle, we find that it is not because the parties are next of kin of the lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

The *Whitbread* case has been frequently cited with approval and followed by the New York courts.

Neither has the New York Supreme Court power to make a will for an incompetent person and it has nothing to do with the disposition of his property at or after his death.

> *The New York Civil Practice Act*, Sections 1357, 1382 and 1383 (printed in Appendix, *infra*).

As was stated by the New York Supreme Court in *Lewis v. Jones*, 50 Barb. 645 (1868), at page 649:

> "The commission, certainly, does not authorize the committee to make a will for his ward; or to dictate to him the terms of it; nor does it vest such power in

> the court. That remains in the lunatic, or inebriate, or else it is suspended or extinguished."

And, again, at page 662:

> "The court has the charge and control of the estate, only during the continuance of the commission; and by the appointment of the committee, it commits the exercise of most of its power to him. But the right of either to control and care for the estate and person of the ward, are for his benefit; and there is nothing in the objects for which the court is vested with its authority over the estate, to sanction the idea that either the court or committee have anything to do with its disposition after his death."

In the absence of any finding by the Circuit Court of Appeals or the District Court below, that the New York Supreme Court exceeded its jurisdiction or abused its discretion in granting these allowances (and there was no such finding), it must be assumed that under the New York law as above set forth the New York Court did not grant the allowances as transfers of a testamentary nature and that they were, therefore, not made in contemplation of death. As Judge Swan points out in his dissent—

> "The state court which directed the payments to be made did not purport to make transfers in contemplation of death and had no legal power to do so. It cannot make testamentary dispositions for the incompetent, N. Y. Civ. Prac. Act, § 1383; * * *" (R. 443).

This was a matter of local law and the Federal Court was not at liberty to substitute its judgment for that of the State Court. Thus, in *Helvering* v. *Stuart*, 317 U. S. 154 (1942), at Page 161, the Court states, in an opinion by Mr. Justice Reed, applying the law of the State of Illinois:

> "The power to transfer or distribute assets of a trust is essentially a matter of local law. *Blair* v. *Commissioner*, 300 U. S. 5, 9; *Freuler* v. *Helvering*, 291 U. S. 35, 43-45."

The local law is correctly stated in the dissenting opinion of Judge Swan and cases (*supra*).

II.

The Circuit Court of Appeals, one member of the court dissenting, has decided a federal question, probably in conflict with applicable decisions of this Court.

The leading case construing the phrase "*in contemplation of death*", the verbiage of which is found in the applicable Regulation 80, Article XVI (printed in Appendix, infra), is *United States* v. *Wells*, 283 U. S. 102 (1931).

The following quotations from the opinion of this Court in the *Wells* case, *supra*, will suffice:

> "The question necessarily is as to the state of mind of the donor" (p. 117).
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> * * * * *
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> "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer * * *" (p. 118).
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> * * * * *
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> "If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos*, which spring from a different motive" (p. 118).

See, also:

> *Milliken* v. *United States*, 283 U. S. 15 (1931);
> *Heiner* v. *Donnan*, 285 U. S. 312 (1932);
> *Colorado National Bank, et al.* v. *Commissioner*, 305 U. S. 23 (1938).

As stated in the dissenting opinion of Judge Swan in this case:

> "The statutory language, as interpreted by the Treasury Regulations and by the opinions of the Supreme Court, clearly shows that the operative fact

which brings the section into play is 'the state of mind' or 'motive' of the donor at the time of the transfer." (R. 442).

In this case, the decedent, prior to the granting of the allowances, had been judicially declared to be incompetent by reason of insanity, and was therefore incapable of exercising or possessing any intent whatsoever.

Certainly, on the face of it the Statute does not cover this case. But the Circuit Court of Appeals construed the section to read: "any interest * * * of which at any time a transfer has been made *from* the decedent in contemplation of death" (R. 438) (Italics ours). This is nothing more or less than judicial legislation, since such a construction disregards the plain mandate of the Statute that not only must the "transfer" be *by the decedent*, but the "contemplation" must be that *of the decedent*. If Congress had intended to cover cases in which the "contemplation" might have been made by someone acting on behalf of the decedent, it would have used some other language.

Such a strained construction disregards decisions of this Court that a taxing act is not to be extended beyond its letter.

> *Crooks, Collector* v. *Harrelson*, 282 U. S. 55 (1930); *Gould* v. *Gould*, 245 U. S. 151 (1917).

Such a construction also disregards other decisions to the effect that the Estate Tax Law is not designed to reach all transfers (*Colorado National Bank, et al.* v. *Commissioner*, 305 U. S. 23) and is a part of a more comprehensive plan which includes the Gift Tax Law. The Estate Tax Law and the Gift Tax Law are in *pari materia* and their history and relationship to one another is clearly outlined in the opinion of Judge Swan in *Hesslein* v. *Hoey*, 91 F. (2d) 954; (certiorari denied, 302 U. S. 756). See, also, *Burnet* v. *Guggenheim*, 288 U. S. 280, 286; *Estate of Sanford* v. *Com-*

missioner, 308 U. S. 39, 42; *Rasquin* v. *Humphreys*, 308 U. S. 54.

In the *Sanford* case, supra, the opinion of the Court was by Mr. Justice Stone.

The Court say:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 et seq. of the Revenue Act of 1924, 43 Stat. 253, reenacted as Sec. 501 et seq. of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws."

Some of the allowances now before this Court were subjected to gift tax in the case of *City Bank Farmers Trust Company* v. *Hoey*, 23 Fed. Supp. 831 (S. D. N. Y. 1938, aff'd 101 F. (2d) 9). In that case, no point was made that the allowances were not gifts and the sole question was whether the gifts had been completed prior to the effective date of the Federal Gift Tax Act (June 6, 1932). A donative intent is unnecessary to render a transfer subject to the Federal Gift Tax Law (Revenue Act of 1932, Sections 501, 503; *Commissioner* v. *Greene*, 119 F. (2d) 383 (C. C. A. 9th, 1941, certiorari denied 314 U. S. 641), which covers cases such as this. The decision of the Circuit Court of Appeals involves a distorted construction of Section 302 (c) of the Revenue Act, which finds no support in the history of this legislation or in the decisions of this Court (cases *supra*). Such a construction is wholly unnecessary to the Congressional purpose and is inconsistent with the comprehensive scheme embodied in the Estate Tax and Gift Tax Laws.

III.

The Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, decided by this Court.

(1) The application of Section 302 (c) of the Revenue Act, under which these *allowances* have been taxed as gifts in contemplation of death, has been the subject of controversy in perhaps hundreds of cases. The question in most of them has been whether under the circumstances of the particular case a gift *inter vivos* has been designed to evade the payment of taxes or intended as a substitute for a testamentary disposition.

The research of counsel has discovered no cases similar to that at bar. *Farwell* v. *Commissioner*, 38 F. (2d) 791 (C. C. A. 2nd, 1930) bears a factual resemblance to the case at bar, but the opinion of the Court concludes with a statement that "no claim is made that the payments involved were gifts in contemplation of death". *City Bank Farmers Trust Company* v. *Hoey* (*supra*), involving these allowances and *Commissioner* v. *Greene* (*supra*) were both gift tax cases. The question presented in the case at bar has not been, but should be, decided by this Court.

The construction of Section 302 (c) of the Revenue Act of 1926 as having any application to an allowance out of the income of an insane person, who died intestate, made pursuant to Court order, is absurd for reasons inherent in the situation. The dominant purpose of the statute "is to reach substitutes for testamentary disposition and thus prevent the evasion of the estate tax".

United States v. *Wells*, 283 U. S. 102 (1931);
Milliken v. *United States*, 283 U. S. 15 (1931).

If the application of the Section is to be extended to cases of this character, the principle is of sufficient importance and so far reaching that it should be announced by this

Court. Otherwise, the decision of the Circuit Court of Appeals is likely to provoke confusion and difficulty in the administration of both the Federal Estate Tax and the Gift Tax Laws.

(2) In dealing with the allowances paid to the incompetent's daughter and grandchildren the court below apparently recognized that some sort of "testamentary purpose" must be found in order to bring the allowances within the reach of Section 302 (c) of the Revenue Act of 1926. This it purported to find in certain remarks of counsel during the allowance proceedings to the general effect that the daughter and grandchildren would take the incompetent's property on her death under the State intestacy laws (R. 441). The majority court below was squarely faced with a situation where there was no evidence in the record of any kind as to testamentary purpose with reference to the allowances directed to be paid to the brother and sisters of the incompetent. Nevertheless, the court stated as the basis of its decision as to this part of the case:

> "And yet it seems to us that it is enough to carry them along with the allowances to the daughter and grandchildren that the property transferred was beyond any power of the donor to enjoy, as were the remainders in The Astor Trust Cases; and that it was in addition beyond her individual power of disposition. . . . With less confidence as to these, we hold that they were also gifts 'in contemplation of death' within Sec. 302 (c)." (R. 441)

The decision therefore construes the Act as being applicable to any transfer of property where (a) the owner himself could not enjoy the property, and (b) where the owner himself could not dispose of the property. The necessary effect of this decision, if permitted to stand, would be to render taxable, as a transfer in contemplation of death, every allowance paid out of an insane person's surplus income, inasmuch as such allowances may only be ordered by the court where provision is first made for the insane person's own needs. Thus no surplus income so transferred

could ever be "enjoyed by the incompetent", and by hypothesis the incompetent could never himself dispose of it.

The necessary result of the decision, therefore is to hold that while sane persons may make transfers which are not taxable as gifts in contemplation of death, every transfer made out of the surplus income of an insane person is taxable as such. No language can be found in the statute nor any intent on the part of Congress enacting it which would support the conclusion that the estates of insane persons are to be discriminated against in any such fashion. Even if this were not true, the statute, as construed by the majority court below, would make such an arbitrary and capricious discrimination against estates of insane persons as a class as to render it violative of the due process clause of the Fifth Amendment of the Constitution of the United States.

Nichols v. *Coolidge*, 274 U. S. 531 (1927);
Hoeper v. *Tax Commission*, 284 U. S. 206 (1931);
Heiner v. *Donnan*, 285 U. S. 312 (1932);
Helvering v. *City Bank Co.*, 296 U. S. 85, 94 (1935).

What is there so contrary to all human experience in a donation by way of allowance from mother to child that it must be inferred as a matter of law that it has the character of a testamentary disposition? In the case of competent people, such transfers are made every day without challenge and the Gift Tax Law amply covers such transfers. The very word "allowance" imports life, not death.

CONCLUSION

Certiorari should be granted.

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Appendix

Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of Internal Revenue Code.

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *
* * * * * * *

(c) *Transfers in Contemplation of, or Taking effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *"

Treasury Department Regulations 80 (approved Nov. 7, 1934):

"ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by

trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers subsequent to the enactment of the Revenue Act of 1916 made in contemplation of death (see article 16); (2) transfers resulting from an arrangement, whether made before or after the enactment of the Revenue Act of 1916, if title was not to pass from the decedent to the beneficiary unless the latter survived the former, or title, having passed, was to be divested and the property returned to the decedent if the beneficiary predeceased him (see article 17); (3) transfers made after the enactment of the Revenue Act of 1916 in the case possession or enjoyment was retained by the decedent (see article 18 and the exception stated therein); (4) transfers in which the decedent retains, either alone or in conjunction with any person or persons, the right to designate who shall possess or enjoy the property or the income thereof, if made after the enactment of the Revenue Act of 1916 (see article 19 and the exceptions stated therein); and (5) transfers made before or after the enactment of the Revenue Act of 1916 in which the enjoyment of the transferred property was subject at decedent's death to any change through the exercise, either by decedent alone or with other person or persons, of a power to alter, amend, or revoke, or if after the enactment of the Revenue Act of 1916 such a power was relinquished by the decedent in contemplation of death (see articles 20 and 21).

The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

To constitute a bona fide sale for an adequate and full consideration in money or money's worth it must have been made in good faith, and the price must have been an adequate and full equivalent, and reducible to a money value. If the price was less than an adequate

and full equivalent only the excess of the fair market value of the property, as of the date of the decedent's death, over the price received by the decedent should be included in the gross estate. For the purposes of the estate tax a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

In the case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof should be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. If the decedent was a nonresident, only one copy, certified or verified, need be filed.

All transfers made by the decedent during his life of an amount of $5,000 or more, except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a brief statement of the pertinent facts should be made.

ART 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase "contemplation of death" as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

As the phrase "transfer in contemplation of death" is applicable to many varying transactions, the circumstances of each case must be examined to ascertain the motive which induced the decedent to make the transfer. If the transfer results from mixed motives, one of which is the thought of death, the more compelling motive controls. A condition of the mind or body of the transferor (whether occasioned by old age or disease) which naturally prompts a testamentary disposition to a proper object of his bounty, will be considered a decisive test of contemplation of death in the absence of proof of the existence of purposes associated with life as the dominant motive for the transfer.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death. This provision applies even though the decedent died subsequent to the effective date of the Revenue Act of 1926 and prior to the effective date of the Revenue Act of 1932. (The conclusive presumption of contemplation of death as described in the second sentence of section 302(c) has been held to be void by the Supreme Court of the United States.)

If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

The fact that a gift was made as an advancement to be taken into account upon the final distribution of the decedent's estate is not, in and of itself, determinative of its taxability.

New York Civil Practice Act, Secs. 1356, 1357, 1382, 1383.

"SEC. 1356. *Jurisdiction of supreme court; concurrent jurisdiction of county court.* The jurisdiction of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article."

"SEC. 1357. *Duty of court having jurisdiction.* The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family."

"SEC. 1382. *Restoration of property.* Where a person with respect to whom a committee is appointed, as prescribed in this article, becomes competent to manage himself or his affairs, the court must make an order discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property remaining in the committee's hands. Thereupon the property must be restored accordingly."

"SEC. 1383. *Death of incompetent; duty of Committee.* Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, shall render to the court by which he was appointed a final account of his proceedings touching the property of the

incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. (Am'd by L. 1935, ch. 724, in effect Sept. 1.)."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

Petitioner,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

While respondent, in its brief in opposition to petitioner's application for a writ of certiorari, goes into the merits of the controversy and the questions of law involved at some length, this short reply brief will be confined principally to pointing out certain misapprehensions as to the facts and the Record which might arise from statements in respondent's brief. The dissenting opinion in the Circuit Court of Appeals below adequately testifies that there is ample to be said in petitioner's behalf on the merits.

1. Respondent's brief, pp. 17, 18:

> "Both the District Court and the court below have found that, insofar as the allowances exceeded those which the decedent had actually made prior to incompetency, they were meant to be advancements to the decedent's heirs on account of the property which they would receive at her death and as a result thereof."
>
> * * * *
>
> "* * * and, since the allowances, so far as they exceeded $6,000 per year to the decedent's living daughter and a like amount to the minor boys of her deceased daughter (see Statement, supra, p. 4), actually constituted advancements to them on account of what they would receive of the decedent's property as her heirs at her death, * * *"

These are misstatements of the record. What the allowance orders in fact provided was that should there ultimately be any inequality in the amount of allowances paid out of the incompetent's surplus income as between her daughter and the guardian of her deceased daughter's minor sons, any excess paid to the one or to the other should be considered as an advancement (R. 17, 23). There was in fact no such inequality or excess of payments and therefore no portion of the allowances in fact constituted advancements (R. 26-34). There was no provision in the orders referring to allowances paid in excess of $6,000 per year or creating any relationship whatsoever between such sum and the question of whether any part of the payments should be considered advancements, and respondent's statement, above quoted, that the District and Circuit Courts below found otherwise is incorrect. The Court's attention is directed to the fact that even under the Treasury Department regulations which were in effect at the time of this decedent's death, "The fact that a gift was made as an advancement to be taken into account upon the final distribution of

the decedent's estate is not, in and of itself, determinative of its taxability." (Regulations 80, Article 16, last paragraph.)

Moreover the statements above quoted give the incorrect impression that $6,000 per year was the maximum amount that the incompetent had given to each of her daughters while she was sane. In fact, prior to her incompetency the incompetent's course of conduct toward her daughters was marked by unusual generosity evidenced by additional lavish gifts in money and money's worth. (See for example, R. 134, 135, 166, 229, 230, 231, 232, 303, 304).

Under the New York law, its Supreme Court in the exercise of its equitable discretion in granting allowances is not limited, as respondent's brief implies, to the amount or amounts which the incompetent had given while sane. It must be assumed, for the purpose of this action, that the allowance orders were within the jurisdiction of the New York Court. *Voorhees* v. *Bank of the United States*, 10 Pet. 449 (1836). But, over-generous distribution, even if indulged in by the New York Court (which we deny), is not automatically testamentary in nature or in contemplation of death. And it is not the province of the Treasury Department or of the Federal Courts to impose a sanction on the free exercise of the equitable jurisdiction of the State Courts in granting allowances by taxing said allowances to the extent that they exceed what the incompetent had given while sane.

2. Respondent, on page 7 of its brief, refers to remarks of counsel which were made in the course of the second allowance proceeding. It is necessary to point out that these remarks refer only to the proposed increases in the allowances, particularly to the retroactive increase extending back to the date of the first allowance order; they have no bearing on the original allowance of $50,000 per annum given by the first allowance order. In any event, it is

obvious that remarks of counsel for one of the parties made in hearings before a referee can not be imputed to the court nor can the court's motive in making an order be determined thereby.

3. At page "14" and "15" of their brief, counsel for the Government dispute the petitioner's contention that the decision of the Court below is in conflict with *United States* v. *Wells*, 283 U. S. 102 (1931), because, "Nothing in the *Wells* case justifies a conclusion that the Court either in substance or effect condemned the attribution to an incompetent of a gift made for her by a duly constituted agent in contemplation of her death". The conflict with the *Wells* case arises from the fact that there the Court held that the differentiating factor between a gift *inter vivos* not subject to the Estate Tax and one in contemplation of death must be found in the transferor's motive. The power of the Court to deal with an incompetent's estate is not derivative from the incompetent but it is inherent in the Court. *Sporza* v. *German Savings Bank*, 192 N. Y. S. 14 (1908). Obviously the relationship of principal and agent, contractual in its nature, does not exist between an insane person, incompetent to make a will and a Court of equity. The distinction is apparent in the enactment of the Gift Tax Law, where motive is immaterial. *Commissioner* v. *Green*, 119 F. (2d) 383; certiorari denied, 314 U. S. 641 (1941). In the case cited, the Court concluded its opinion: "Respondent's contention that there was no donative intention is immaterial because §563 of the Act in question does not require it." Thus respondent can derive no aid from the taxation of some of these allowance payments as gifts under the holding of *City Bank Farmers Trust Co.* v. *Hoey*, 101 F. (2d) 9 (1939), which is stressed in its brief. Whatever the relationship between the New York Courts and the incompetent, it is clear that it did not, under the New York law, extend to the Court the power to indulge in motives, in her behalf, such

as to brand the allowances as testamentary dispositions or transfers in contemplation of death.

Ex Parte Whitbread, 2 Mer. 99; 35 Eng. Rep. 878 (1816);
Lewis v. *Jones*, 50 Barb. 645 (1868).

4. Respondent's brief, p. 17:

> "Its contention is that the New York court had no power under local law to make a transfer of any portion of an incompetent's property and has not expressly stated that it did, and that consequently it must be presumed conclusively, even contrary to the fact, that it did not do so."

This completely misstates petitioner's contention. The applications for allowances were necessarily predicated on the existence of such a power. Petitioner's position is that the authority and jurisdiction which the New York courts enjoy is limited in nature and does not extend to the making of transfers of a testamentary nature or in contemplation of death and that consequently respondent's characterization of these transfers as such necessarily involves the assertion that the New York State Court exceeded its jurisdiction in granting the allowances.

5. Finally, it is to be noted that the respondent's brief makes no mention of the point which most troubled the majority of the Circuit Court of Appeals below, namely, the taxability of the allowances made to four sisters and a brother—collateral relatives as to whom the issue of "anticipation of succession" (which is not the test under the Federal Estate Tax Law) could not arise.

CONCLUSION

Certiorari Should Be Granted

Respectfully submitted,

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Judge upon the trial of the case is printed at pages 387-400 of the Record and is reported in 43 Fed. Supp. 790.

The majority opinion of the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment of the United States District Court for the Western District of New York, entered May 14, 1943 (R. 416), and the dissenting opinion, which were handed down May 10, 1944, are printed at pages 436-444 of the Record and are reported in 142 F. (2d) 599.

Jurisdiction

The mandate of the Circuit Court of Appeals was entered on May 27, 1944 (R. 444). The petition for certiorari was filed on July 27, 1944 and granted on October 9, 1944. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347).

Question Presented

Whether annual allowances out of the surplus annual income of an incompetent person, duly adjudged incapable of managing her person and affairs, paid by the Committee of the Property, pursuant to orders of the New York Supreme Court, to various members of her family, over a period of approximately nine years preceding her death, and comprising approximately 200 quarter-annual payments of allowance moneys for the benefit of these persons, were transfers made by the decedent in contemplation of her death and, therefore, part of decedent's estate taxable under the Federal Estate Tax Law (Revenue Act of 1926, Section 302 (c), as amended; now Section 811 (c) of Internal Revenue Code).

Statement of the Case

This action was instituted in the District Court for the Western District of New York by the Administrator of the Estate of Helen Hall Vail for a refund of estate taxes alleged to have been illegally and erroneously assessed and collected upon a deficiency assessment (R. 2-12). This deficiency was in addition to the sum of $419,616.73 of Federal estate taxes levied and collected upon assets of the decedent, Helen Hall Vail, on hand at the date of her death, as to which sum no claim for refund is made or here involved (R. 362).

In August, 1926, the decedent, in a proceeding in the New York Supreme Court, was duly adjudicated to be incompetent (R. 78) and a Committee of the Property was appointed by that Court (R. 83). The incompetent lived until December 27, 1935 (R. 74), a period of some nine years.

The incompetent was a very wealthy woman. For the four or five years preceding the adjudication of her mental incompetency her income had averaged over $300,000 per year (R. 171-172). In 1926, the year in which she was com-

mitted, her total gross income was $651,000 as against $308,000 in 1925 (R. 163). Prior to her incompetency she had lived in great luxury (R. 149-150; 230-232) which she shared with her daughters both before and after their respective marriages (R. 226-227; 241-243; 305-306). In addition she had been in the habit over many years prior to her incompetency of making outright gifts, both by way of annual allowances and very substantial additional gifts, to her children (R. 134-135; 166; 169; 278). Also, she was mindful of the real financial need of her brother and sisters (R. 112; 116; 129).

As a result of her incompetency, Mrs. Vail's mode of living became drastically restricted. Although she was surrounded by every available comfort at the private sanatorium to which she was confined (R. 100), the total amount which could reasonably be expended for her care and the care of her property did not exceed $50,000 per year (R. 172). She could no longer enjoy her mansions in Florida and in Geneva, New York, and her summer home in Spring Lake, New Jersey. And her bounty to her children and to her brother and sisters perforce ceased.

In October, 1926, after Mrs. Vail had been declared incompetent, her daughter, MaBelle Houghton Plumb, applied to the New York Supreme Court for an order directing the Committee of the Property to pay to the persons named in the petition annual allowances from the income of the incompetent to the extent that the Court might find that such allowances would have been made by the incompetent had she been competent and mentally normal (Pl. Ex. 9, R. 54; 96-101).

Hearings were held before a referee (Pl. Ex. 14, R. 56; 106-160) and on the basis of the testimony and the findings of the Referee (Pl. Ex. 15, R. 56; 161-169), the New York Supreme Court entered an order (Pl. Ex. 16, R. 56; 170-174) which, among other things, found that her income for the previous five years had averaged $300,000 per year and that to maintain and support the incompetent and care properly

for her and her property there could not reasonably be expended more than $50,000 a year and "that if the said incompetent Helen Hall Vail, were in the possession of her mental faculties and in all respects competent, she would desire the allowances hereinafter fixed to be made to the persons hereinafter designated" (R. 172) and directed the following annual allowances to be made to the following relatives of the incompetent from the income of the incompetent:

MaBelle Houghton Plumb, a daughter	$50,000.
Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren (sons of a deceased daughter)	$50,000.
Edward Hageman Hall, a brother	$ 2,000.
Mary Hall Taft, a sister	$ 3,000.
Elizabeth Hall Burdick, a sister	$ 2,000.
Abbe Ferrin, a sister	$ 2,000.
Lucy H. Ferris, a sister	$ 2,000.

(R. 172-173)

In 1932, after a further hearing before a referee appointed by the New York Supreme Court (Pl. Ex. 26, R. 59; 91-270), the aforesaid annual allowances out of income to the daughter and to the General Guardian of the three minor grandchildren of the incompetent were each increased by $25,000 per annum, payable quarterly out of surplus annual income. This order further directed that these increased allowances be made retroactive for five and one-quarter years and paid out of the then accumulated surplus annual income of the incompetent (Pl. Ex. 30, R. 60; 285-293).

The order of the New York Supreme Court, dated June 1932, contained findings that accumulated income in the hands of the Committee then amounted to a sum in excess of $1,000,000, that the income of the incompetent for a period of five and one-half years prior thereto had averaged about $295,000 a year and the surplus income, after paying all

penses, including allowances theretofore granted by the
7 allowance order, and paying all expenses on account
the incompetent for care and maintenance of her and
property, had averaged about $191,000 per annum, and
t if the incompetent had been in possession of her mental
ulties and in all respects competent, she would have de-
ed that the allowances fixed by said order of June 3,
2 be made and would have made such annual allow-
es out of her income (R. 286-287).

In no instance was the principal of the incompetent's
ate to be expended under either of these orders; they
cifically provided that all of the allowances were to be
d out of income (R. 15; 21).

Over a period of approximately nine years the Commit-
of the Property, obedient to said orders of the New York
preme Court, paid out of the incompetent's surplus in-
e to the persons named in the orders, allowances which
regated the sum of $1,377,886.67 (R. 26-34). There
e, in all, approximately 200 quarter-annual payments
llowances to nine different individuals, extending over
riod of nearly nine years (R. 26-34). The Federal Gift
was paid on all amounts (above allowable exemptions)
after its effective date. (*City Bank Farmers Trust Co.*
ey, 23 Fed. Supp. 831 (S. D., N. Y., 1938), *aff'd*, 101 F.
9 (C. C. A. 2nd, 1939).

On the death of the said incompetent, Helen Hall Vail,
Administrator of her estate filed a Federal estate tax
rn showing a tax of $419,616.73 due on the assets on
l at the time of her death (R. 362). For information pur-
s a statement was included in said return describing
transfers by way of annual allowance pursuant to the
York Supreme Court orders which are involved in the
ant case. The above mentioned tax of $419,616.73 was
when the estate tax return was filed, and no claim for
nd with respect to any of said tax has been filed and no
thereof is in dispute or involved in the instant case.
ever, the aggregate of the payments made pursuant
rders of the New York Supreme Court was included by
Commissioner of Internal Revenue in the incompetent's

estate for Federal estate tax purposes on the theory that such payments were made in contemplation of death. An additional tax, including interest, of $466,912.27 was thereon assessed and paid, claim for refund was duly filed and rejected, and the Administrator in this action sued for a refund of the additional tax (R. 2-12).

The case was tried by the District Court, without a jury, which granted judgment in favor of the plaintiff to the extent of $54,100.24 and for the defendant as to the remainder of the amount sued for (R. 416-417) on the theory that the allowances, to the extent of $6,000 per annum to each branch of the family and of $500 paid annually to one of the collateral relatives, were not made in contemplation of death but that the same allowances, to the extent that they exceeded $6,000 and the allowances to the other collaterals, were made in contemplation of death and in "anticipation of the succession to the estate of the incompetent" (R. 411). This decision of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, with Swan, J., dissenting (R. 436-444).

Specification of the Errors to Be Urged

Petitioner specifies as errors the adverse holdings of the Court below, as follows:

(1) The Court below erred in holding that the allowances paid by the Committee, pursuant to orders of the New York Supreme Court, to the daughter and grandchildren of the incompetent were transfers in contemplation of death within the purview of the statute (Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of the Internal Revenue Code).

(2) The Court below erred in holding that the allowances paid by the Committee, pursuant to orders of the New York Supreme Court, to the brother and sisters of the incompetent were transfers in contemplation of death within the purview of the statute (Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of the Internal Revenue Code).

(3) The Court below erred in holding that Section 302 (c), of the Revenue Act of 192[illegible], as amended; now Section 811 (c) of the Internal Revenue Code, is to be construed as embracing transfers which were not made by the decedent but from her property.

(4) The Court below erred in holding that Section 302 (c) of the Revenue Act of 1926, as amended; now Section 811 (c) of the Internal Revenue Code, is to be construed as embracing such a transfer as the Federal court finds would have been made by the incompetent during a lucid interval, in which imminent incompetency is contemplated.

(5) The Court below erred in holding that Section 302 (c), of the Revenue Act of 1926, as amended; now Section 811 (c) of the Internal Revenue Code, is to be construed as including transfers of property of a decedent, merely because the result is to benefit donees who would eventually inherit the decedent's property, even though death be not contemplated.

(6) The Court below erred in holding that testamentary motive may be attributed to the orders of the New York Supreme Court, which directed the payment of these allowances.

(7) The Court below erred in holding that the intent of the court must control rather than such intent, if any, as may be found in the incompetent upon an examination of the record.

(8) The Court below erred in holding that the payments of income directed by the orders of the New York Supreme Court were substitutes for testamentary disposition because made out of income of an incompetent person, who had no power to dispose of it and could not enjoy it during life.

(9) The Court below erred in holding that the Record of this case shows that the allowances directed by orders of the New York Supreme Court arose from motives associated with death rather than with life.

(10) The Court below erred in holding that the intent of the New York Supreme Court could be split so as to result in a decision that the allowances were in contemplation of death to the extent that they exceeded $6,000 per annum, but not in contemplation of death to the extent that they were less than that amount.

(11) The Court below erred in holding that it was within its province to review the discretion exercised by the New York Supreme Court in awarding allowances out of the surplus income of the incompetent.

SUMMARY OF ARGUMENT

Counsel for Petitioner will argue:

I

The Federal Estate Tax Law was not enacted by Congress, and cannot be construed, to embrace transfers by way of annual allowances out of the surplus income of an incompetent person granted by a state court pursuant to its general equity jurisdiction.

The statute (Revenue Act of 1926, Section 302 (c), as amended; now Section 811 (c) of Internal Revenue Code) provides, in effect, that to be taxable as in contemplation of death, a transfer must be made by the decedent himself and the required testamentary motive must be his. This Court and all other courts have consistently construed the statute as requiring such testamentary motive. A transfer of the decedent's property by another, where the decedent had no knowledge of it and, particularly, where the decedent did not, in law or in fact, entertain any testamentary motive is not embraced within the language of the statute upon any reasonable construction. It contains no verbiage from which it may be inferred that Congress desired to tax transfers of the surplus income of an insane person pursuant to orders of an equity court. To so hold, as did the

lower Court, is pure judicial legislation. No agency or privity between the insane person and the Court existed, and there is no reason in a case where the transfers are subject to the Gift Tax Law and have been taxed, as some of them have in this case, to strain for a distorted construction of the statute.

II

Long established principles of equity as adopted and practiced by the New York Supreme Court preclude it from making transfers in contemplation of death or of a testamentary nature. The Circuit Court of Appeals below conceded that a motive or intent must be found in order to characterize the transfer as one in contemplation of death (R. 438). That Court also conceded that such a motive or intent could not be found in the incompetent herself, but purported to find it in the New York Supreme Court which granted the allowances (R. 438). The New York Supreme Court did not have the jurisdiction or power to indulge in the testamentary motive or intent required by the Federal Estate Tax Law as construed heretofore by this and other courts. The orders granting the allowances must be presumed to have been within the jurisdiction of the New York Supreme Court.

III

The record is devoid of evidence that the New York Supreme Court exceeded its powers in this case. The records in the New York proceedings show that the New York Supreme Court did not go beyond its power and indulge in any testamentary motive or intent. They show that the allowances were granted for purposes associated with life; that there was no purpose to provide for the recipients at or after the death of the incompetent; that there was no purpose to avoid Federal estate taxes; that there was no testamentary motive indulged in by the New York Supreme Court.

IV

The Court below erred in assuming to sit as a court of review of the New York Supreme Court and in finding, in effect, that the allowance orders made by that Court were beyond its jurisdiction and power and an abuse of its discretion.

In holding that only the excess of the allowances over $6,000 per annum to the daughter and grandchildren of the decedent is to be deemed taxable as a transfer in contemplation of death, it is evident that the Court below undertook to review the proceedings in the New York Supreme Court. It was, however, not within the province of the Federal court to supersede the determination of the New York Supreme Court as to what allowances should be made. The power to transfer or distribute property of an incompetent is essentially a matter of local law.

V

The Circuit Court of Appeals erred in holding that the allowances are to be deemed within the purview of the Estate Tax Law because by such a disposition the donees anticipated benefits receivable by them upon the death of the decedent. In reaching its conclusion, the Court below overlooked the necessity for motive in the application of the statute to the transfers involved. Even this argument is unavailable in the case of gifts to the collateral relatives, who, upon the death of Mrs. Vail intestate, were entitled to no share in her estate. It appears from the Record that the gifts to them were entirely dictated by their need. The necessary result of the decision of the lower Court is that every transfer out of the surplus income of an insane person is taxable as a transfer in contemplation of death. No language can be found in the statute to support such a construction. As thus construed, the statute arbitrarily and capriciously discriminates against the estates of insane persons and violates the due process clause of the Fifth Amendment of the Constitution of the United States.

ARGUMENT

POINT I

The annual allowances paid by the Committee were not gifts in contemplation of death within the purview of the statute. The decision of the lower courts involves a distorted construction of the Act unnecessary to the Congressional purpose, which was to tax substitutes for testamentary dispositions.

NOTE: The jurisdiction of the New York Supreme Court to grant allowances out of the surplus income of an incompetent person's estate, together with the long-established equitable principles as adopted and practiced by the State court and the limitations upon the powers of that Court, which preclude it from making transfers of a testamentary nature, are fully discussed in Point II, *infra*, p. 17.

The pertinent provisions of the applicable statute involved (Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of Internal Revenue Code) are as follows:

> "SEC. 811 GROSS ESTATE.
>
> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> "(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or

intended to take effect in possession or enjoyment at or after his death, * * *."

The leading case construing the phrase "in contemplation of death" is *United States* v. *Wells*, 283 U. S. 102 (1931).

The following quotations from the opinion of this Court in the *Wells* case, *supra*, will suffice:

"* * * The question, necessarily, is as to the state of mind of the donor." (p. 117).

* * * * *

"* * * The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, * * *." (p. 118).

* * * * *

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive * * *." (p. 118).

The applicable Regulations of the Treasury Department (priated in Appendix, pp. 45-48, *infra*) have in substance adopted the foregoing and other language of the *Wells* case.

See also:

Milliken v. *United States*, 283 U. S. 15 (1931);
Heiner v. *Donnan*, 285 U. S. 312 (1932);
Colorado National Bank, et al. v. *Commissioner*, 305 U. S. 23 (1938).

As stated in the dissenting opinion of Judge Swan in the instant case:

"The statutory language as interpreted by Treasury Regulations and by the opinions of the Supreme

> Court, clearly shows that the operative fact which brings the section into play is 'the state of mind' or 'motive' of the donor at the time of the transfer. • • • " (R. 442).

The lower Court admitted that the incompetent was not capable of having any intent and, accordingly, looked to the New York Supreme Court for an intent which it could attribute to the incompetent so as to bring this case within the statute (R. 438).

Certainly, the language of the statute does not cover this case. But the Circuit Court of Appeals in disregard of the plain mandate of the statute, that not only must the "transfer" be *by the decedent* but the "contemplation" must be that *of the decedent*, construed the section to read: " 'any interest • • • of which at any time a transfer has been made *from* the decedent in contemplation of death' " (R. 438) (italics ours). In so holding, the majority Court below recognized that it was indulging in judicial legislation when it stated that although the words of the statute do not apply to this case, 'if Congress had been faced with a situation like that before us, it would have included payments made by the court out of the property of an incompetent; to hold otherwise would be to frustrate the plain purpose of the section." (R. 438).

There is not the slightest evidence that Congress would have done any such thing or that its purpose in enacting the section would otherwise be frustrated. The plain fact is that Congress was striking at the evasion of estate taxes by a decedent making gifts in contemplation of death.[1] There is nothing to indicate that Congress intended to penalize wards of the sovereign and their estates in court custody, or that Congress was fearful lest courts would

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[1] "• • • The dominant purpose [of the section] is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. • • •" *U. S.* v. *Wells*, 283 U. S. 102, 116-117. See also, *Milliken* v. *U. S.*, 283 U. S. 15, 23.

either exceed their jurisdiction by making allowances out of such persons' surplus income, or would seek by such devices to evade the payment of revenues to the Federal government, and incidentally to their respective state governments. The whole evidence is to the contrary, namely, that Congress intended the statute to reach only to cases where the motive and the impelling force of the gift stemmed from the decedent.

The extension of the statute by the Court below beyond the clear import of its language disregards decisions of this Court and violates the elementary rule applicable to the construction of a taxing act, namely, that tax statutes are not to be extended by implication beyond the clear import of the language used.

> *Crooks, Collector* v. *Harrelson*, 282 U. S. 55 (1930);
> *Shwab* v. *Doyle*, 258 U. S. 529 (1922);
> *Gould* v. *Gould*, 245 U. S. 151 (1917).

As Judge Swan states in his dissenting opinion in this case:

> "* * * The allowances in question have been subjected to a gift tax under the Revenue Act of 1932. *City Bank Farmers Trust Co.* v. *Hoey*, 2 Cir., 101 F. 2d 9. I am unable to find in the words of section 302 (c) adequate language to subject them to the estate tax. * * * Whether Congress would wish to impose an estate tax on gifts made out of an incompetent's surplus income by court order for the support and education of his family seems to me the merest surmise. At any rate, it has not said so in language justifying the courts in so holding. * * *" (R. 443, 444).

Nor can such a construction be supported on any theory of agency. The power of an equity court to deal with an incompetent's estate is not derivative from the incompetent, but flows directly from the sovereign. No relationship of principal and agent or any other manner of privity exists between an insane person and the court.

In *Sporza* v. *German Savings Bank*, 192 N. Y. 8 (1908), the New York Court of Appeals said, at page 14:

> "Jurisdiction is inherent in the state over unfortunate persons within its limits who are idiots or have been deprived of the use of their mental faculties. * * *"

The construction adopted by the Circuit Court of Appeals also disregards other decisions to the effect that the Estate Tax Law is not designed to reach all transfers (*Colorado National Bank, et al.* v. *Commissioner*, 305 U. S. 23) and is a part of a more comprehensive plan which includes the Gift Tax Law. The Estate Tax Law and the Gift Tax Law are in *pari materia* and their history and relationship to one another is clearly outlined in the opinion of Judge Swan in *Hesslein* v. *Hoey*, 91 F. (2d) 954 (C. C. A. 2nd, 1937), *cert. denied*, 302 U. S. 756 (1937).

See, also:

Burnet v. *Guggenheim*, 288 U. S. 280, 286 (1933);
Estate of Sanford v. *Commissioner*, 308 U. S. 39, 42 (1939);
Rasquin v. *Humphreys*, 308 U. S. 54 (1939).

In the *Sanford* case, *supra*, Mr. Justice Stone, speaking for the Court, said at p. 42:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 *et seq.* of the Revenue Act of 1924, 43 Stat. 253, re-enacted as § 501 *et seq.* of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. * * *"

All of the allowances now before this Court, which were paid after the effective date of the law and not within the

exemptions thereof, were subjected to gift tax in the case of *City Bank Farmers Trust Co.* v. *Hoey*, 23 Fed. Supp. 831 (S. D., N. Y., 1938), *aff'd*, 101 F. (2d) 9 (C. C. A. 2nd; 1939). In that case, no point was made that the allowances were not gifts within the meaning of the Gift Tax Law and the sole question was whether the gifts had been completed prior to the effective date of the Federal Gift Tax Act (June 6, 1932). While under the Estate Tax Law the finding necessary to support a gift in contemplation of death is not a mere donative intent but a particular state of mind, namely, the thought or contemplation of death, not even a donative intent is necessary to render a transfer subject to the Federal Gift Tax Law (Revenue Act of 1932, Sections 501, 503) which covers cases such as this. See also, *Commissioner* v. *Greene*, 119 F. (2d) 383 (C. C. A. 9th, 1941), *cert. denied*, 314 U. S. 641 (1941).

The decision of the Circuit Court of Appeals, holding, as it did, that the transfer, by a state court, of portions of the surplus income of an incompetent person who could not contemplate anything, was a transfer by the deceased incompetent in personal contemplation of her death, involves a distorted construction of Section 302 (c) of the Revenue Act which finds no support in the history of this legislation or in the decisions of this Court (cases, *supra*). Such a construction is wholly unnecessary to the Congressional purpose and is inconsistent with the comprehensive scheme embodied in the Estate Tax and Gift Tax Laws. We find nothing out of harmony with this view in the recent decision of this Court in *Smith* v. *Shaughnessy*, 318 U. S. 176 (1943). In that case, this Court, in an opinion by Mr. Justice Black, pointed out that the Gift and Estate Tax Laws are not always mutually exclusive. It did not involve payments pursuant to court order out of the income of an incompetent person. Transfers not within the purview of the Estate Tax Law are taxed by its supplement, the Gift Tax Law, and when that occurs, there is no need

or reason for a court to invoke a strained construction of the Estate Tax Law to bring the transfer within its scope.

POINT II

Testamentary motive may not be attributed to the orders of the New York Supreme Court which had no power to grant allowances "in contemplation of death".

From the inception of our system of common law the sovereign, pursuant to his power as *parens patriae*, was the protector of lunatics.[2] At an early date, this function was delegated to his Chancellor, not as head of the Chancery Court, but as the King's personal representative. The

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[2] The duty of the Sovereign to these wards of the state and members of their families received statutory recognition as early as 1326. "The King shall have the Custody of the Lands of natural Fools taking the Profits of them without Waste or Destruction, and shall find them their Necessaries, of whose Fee forever the Lands be holden. (2) And after the Death of such Idiots he shall render it to the right Heirs, so that such Idiots shall not aliene, nor their Heirs shall be disinherited."

"Also the King shall provide, when any (that beforetime hath had his Wit and Memory) happen to fail of his Wit, as there are many *per lucida intervalla*, that their Lands and Tenements shall be safely kept without Waste and Destruction, and that they and their Household shall live and be maintained competently with the Profits of the same, and the Residue besides their Sustentation shall be kept to their Use, to be delivered unto them when they come to right Mind; (2) so that such Lands and Tenements shall in no wise be aliened: (3) and the King shall take nothing to his own Use; (4) And if the Party die in such Estate, then the Residue shall be distributed for his Soul by the Advice of the Ordinary." 17 Edw. II c. IX, X, Pickering's Translation.

Chancellor's function under this delegation was confined to adjudication of lunacy and appointment of a conservator. By reason of his general jurisdiction over fiduciary matters, the Chancellor, as head of the court of equity, had had from the inception of that court, jurisdiction over the custody and management of estates or property of lunatics as to whom commitment and appointment of a conservator had been accomplished. Ultimately, both of these functions—(1) commitment, and appointment of a conservator of property, and (2) custody and management of property—though arising from different sources, became vested in the Chancery Court.

Pomeroy, *Equity Jurisprudence*, 4th Edition, 1918, Volume III, Section 1311;
Sporza v. *German Savings Bank*, 192 N. Y. 8 (1908);
Butler v. *Jarvis*, 4 N. Y. Supp. 137 (1889).

When this country became independent of Great Britain, all the powers of the former English Court of Chancery became vested in the New York Court of Chancery and, later, in the New York Supreme Court which succeeded to the powers of both the Law and the Chancery Courts. In the State of New York the two types of jurisdiction—(1) commitment, and appointment of conservator of property and (2) custody and management of property—became merged in the New York Supreme Court. The delegation to the New York Supreme Court by the sovereign, the State, of the power to commit and appoint a conservator (called a "committee") is found in Sections 1356 ff. of the New York Civil Practice Act (printed in Appendix, pp. 49-52, *infra*), and while some of the committee's powers and duties are also found there, the New York Supreme Court continues, except as the said statute is inconsistent therewith, to exercise its jurisdiction over the management of the incompe-

tent's property by virtue of its general equity powers which it inherited from the English Chancery Court.[3]

In the case of *In Re Andrews*, 192 N. Y. 514, 523 (1908), the New York Court of Appeals said:

> "The present Constitution of the state, adopted in 1894, continues the Supreme Court 'with general jurisdiction in law and equity.' (Const. art. VI sec. 1.) This preserves the jurisdiction over lunatics and their property which was originally vested in the chancellor and Court of Chancery, and was subsequently transferred to the old Supreme Court, as it existed prior to the adoption of the Constitution of 1846. That jurisdiction, however, as to the manner of its exercise may be regulated by the Legislature, and where this has not been done, it is to be exercised according to the established practice of the courts in lunacy cases. * * *"

The general principles of equity governing the custody and management of the property of incompetents, as adopted and practiced by the New York Supreme Court, may be stated briefly as follows:

1. The real custodian of the incompetent's estate is the Court, and the committee is merely the agent or bailiff of the Court (*Lewis* v. *Jones*, *infra*, pp. 24-25).

2. The Court's authority does not in any way derive or stem from the incompetent person, but is inherent. The jurisdiction over the commitment and appointment of a conservator of the incompetent's property stems directly from the sovereign, and the jurisdiction over the management of the incompetent's property stems from the Court's general jurisdiction over fiduciary matters. The Court is not the legal representative or agent of the incompetent. There is no

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[3] It is thus clear that the power of the New York Supreme Court derives entirely from the sovereign and from its own inherent equity powers and not from the incompetent. The effect of this fundamental distinction on this case is discussed at pages 14-15, *supra*.

privity between the Court and the incompetent (*Sporza* v. *German Savings Bank, supra*, p. 15).

3. The primary consideration controlling the management and custodianship of the incompetent's property is that it shall not be wasted or destroyed but must be preserved for the possibility of the incompetent's recovery. (*Pomeroy*, p. 18, *supra*, *Ex parte Whitbread*, p. 21, *infra*, and *Lewis* v. *Jones*, *infra*, pp. 24-25.)

4. The Court has no authority to make a will for an incompetent nor to make any testamentary disposition of the incompetent's property of any nature (*Lewis* v. *Jones*, *infra*, pp. 24-25).

5. The Court's authority over the incompetent's affairs ceases immediately upon the incompetent's death, and it has no power to control or make any disposition of the incompetent's property effective thereafter (New York Civil Practice Act, Section 1383. Printed in Appendix, pp. 51-52, *infra*; *Lewis* v. *Jones*, *infra*, pp. 24-25).

6. The Court has the jurisdiction and power to grant such allowances out of surplus income as it finds on the record before it that the incompetent would probably have granted himself had he been sane (see following discussion).

Principle numbered 6 above, a long established principle of equity, is one that has been followed by the Chancery Courts of England and by the Chancery and New York Supreme Court. The extent to which this is true may be seen from the following citation of some of the cases in which litigation has developed in connection with the granting of such allowances and in which the principle has been reaffirmed.

Matter of Blewitt, 131 N. Y. 541, 546 (1892);
Sporza v. *German Savings Bank*, 192 N. Y. 8 (1908);
In Re Andrews, 192 N. Y. 514 (1908);
Matter of Flagler, 248 N. Y. 415 (1925);

Parsee Merchant's Case, 11 Abb. Prac. N. S. 209, 219 (1871);
Ex Parte Whitbread, 2 Mer. 99; 35 Eng. Rep. 878 (1816);
Matter of Willoughby, 11 Paige 257 (1844);
Matter of Heeney, 2 Barb. Ch. 326 (1847).

The primary duty of the court is to preserve an incompetent's property for possible recovery of sanity, and allowances are granted only out of surplus income because of the principle of protection by the sovereign which requires that the care of an incompetent and his property must first be provided for. The amount and proportions of such allowances are entirely within the discretion of the court, and the allowances are not necessarily to be confined to such amounts as may be necessary for the support of the recipients thereof, nor confined to persons legally dependent upon the incompetent.

A clear statement of the principle is to be found in the leading English case, *Ex parte Whitbread, supra*, which has been frequently cited with approval and followed by the New York courts. At page 102 of Merivale's Report, Lord Eldon said:

> "• • • So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish,—but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.
>
> • • • • •

> "* * * and if we get to the principle, we find that it is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

This principle, as stated by Lord Eldon, has no reference to the death of an incompetent—in fact, the court expressly refuses to consider kinship to the incompetent as a ground for granting the allowances. The court is governed only by a consideration of how the incompetent would probably desire his surplus income to be used during the continuance of his life. It so happens that next of kin are usually the natural objects of a giver's bounty in his lifetime.

In the State of New York, the leading case is *Matter of Flagler* (p. 20, *supra*). At p. 418 the Court of Appeals stated in an opinion by Lehman, J.:

> "If Mrs. Flagler to-day could decide upon the disposition of the income of her great estate, moral or charitable considerations would dictate her decision only to the extent that she felt their force. Her great affluence might impel her to relieve the distress of her cousin; the law would not compel her to do so if she decided otherwise. The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incompetent. *In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them.* Allowances for the support of collateral relatives of the incompetent have been made 'upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind.' (*Matter of Lord*, 227 N. Y. 145.) The Appellate Division correctly held that the allowance made at Special Term may be justified upon no other theory. *Upon an examination of the record* we find that the evidence leads logically to the conclusion that Mrs. Flagler, if sane, would to-day provide some relief for the petitioner." (Italics ours.)

Thus it is held by the New York Court of Appeals that what the incompetent would have done if sane is to be established by the record before the court which grants the allowances. The Circuit Court of Appeals in the instant case, however, has misapprehended and misapplied the law of the State of New York and held that:

> "* * * the intent of the court must control in deciding whether the payments were made in 'contemplation of death,' for obviously the incompetent herself could have no intent of any kind. The judges' intent was to make such gifts as the incompetent would have made, if she had been competent, so the orders said; but that cannot have meant such gifts as she would have made, had she been not only competent, but expecting to continue competent until she died. It must have meant such gifts as she would have made, if for the moment lucid, *but with the prospect of imminent incompetency before her.*" (R. 438.) (Italics ours.)

There is no basis whatsoever in the statutes of New York or in the decisions of its courts for the theory of the Circuit Court of Appeals that the jurisdiction and power of the New York courts is limited to granting such allowances as the incompetent would have made if for the moment sane "but with the prospect of imminent incompetency before her." The New York rule is, as expressed above in the *Flagler* case, that the allowances may be granted "upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind." This error of the Court below is important for its whole decision turns upon this misconstruction and misconception of the New York law.

Also, the result reached by the Circuit Court of Appeals is in obvious conflict with the New York decisions, because on the "lucid interval plus imminent insanity" theory which it formulated, and which Judge Swan in his dissenting opinion characterized as the "veriest fiction" (R. 443), the New York courts would be free to give away all of an in-

competent's property, save perhaps what might be required for his maintenance and support. This is not the law of New York.

The New York courts have no power to make any allowances out of the income of an incompetent on the theory that he is permanently insane. The property of such a person must be managed on the assumption that he may recover sanity. This is the whole purpose of the solicitude of the sovereign as evidenced by the conservation machinery set up by the law of New York.

As was said in *Ex Parte Whitbread, supra:*

> "* * * Nevertheless, the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. * * *"

For the same reason, neither has the New York Supreme Court power to make a testamentary distribution of an incompetent's property. It cannot make a will for an incompetent person and it has nothing to do with the disposition of his property at or after his death.

> *The New York Civil Practice Act*, Sections 1357, 1382 and 1383 (printed in Appendix, pp. 50, 50-52, *infra*).

As was stated by the New York Supreme Court in *Lewis* v. *Jones*, 50 Barb. 645 (1868), at pages 649-650:

> "* * * The commission, certainly, does not authorize the committee to make a will for his ward; or to dictate to him the terms of it; nor does it vest such power in the court. That remains in the lunatic, or inebriate, or else it is suspended or extinguished. * * *"

And, again, at page 662:

> "The court has the charge and control of the estate, only during the continuance of the commis-

> sion; and by the appointment of the committee, it commits the exercise of most of its power to him. But the right of either, to control and care for the estate and person of the ward, are for his benefit; and there is nothing in the objects for which the court is vested with its authority over the estate, to sanction the idea, that either the court or committee have any thing to do with its disposition after his death."

In the absence of any finding by the Circuit Court of Appeals or the District Court below, that the New York Supreme Court exceeded its jurisdiction or abused its discretion in granting these allowances (and there is no such finding), it must be assumed that in this case the New York Court respected the New York law as above set forth and did not grant the allowances as transfers of a testamentary nature and that they were, therefore, not made in contemplation of death. As Judge Swan points out in his dissent—

> "* * * The state court which directed the payments to be made did not purport to make transfers in contemplation of death and had no legal power to do so. It cannot make testamentary dispositions for the incompetent, N. Y. Civil Practice Act, § 1283; * * *" (R. 443).

Except for the above expression of Judge Swan, both the lower Courts entirely disregarded the limitations on the New York Supreme Court's equitable jurisdiction which, as shown above, preclude it from making any transfers upon consideration of the incompetent's death or in the interest of next of kin. To hold, as the lower Courts did, that the New York Supreme Court granted the allowances in contemplation of the incompetent's death was to hold implicitly that the New York Supreme Court, in granting these allowances, exceeded these limitations upon its jurisdiction and the Courts below in so holding acted improperly and erroneously. The orders granting the allowances must be presumed in the absence of fraud or collusion to have been within the jurisdiction of the court which made them.

In *Voorhees* v. *Bank of The United States*, 10 Pet. 449 (1836), this Court said at p. 472:

> "• • • There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. • • •"

See, also:

> *Freeman on Judgments*, 5th Ed. (1925) at page 831, Sec. 387, dealing with Presumptions as to Regularity in Exercise of Jurisdiction.

POINT III

The Record is devoid of evidence to sustain the determination of the Court below that the New York Supreme Court awarded the allowances in contemplation of death in violation of its jurisdiction.

When the Record is examined against the background of correct and well-established legal principles, it is found not only to be lacking in any substantial evidence to support the decision of the Court below but also to compel the opposite conclusion.

(a) The allowances were granted for purposes associated with life.

The material portions of the records of the two allowance proceedings instituted in 1926 and 1932, respectively, are in evidence in this case (R. 96-308). From these records it appears unmistakably that the alleged "transfer in contemplation of death" consisted of approximately two hundred separate quarter-annual payments made out of surplus

annual income over a period of approximately nine years preceding the incompetent's death to or for the benefit of the daughter, grandchildren, brother and sisters of the incompetent; all of such payments having been made by the Committee for the incompetent pursuant to orders of the New York Supreme Court (R. 170; 285). These records further show that the allowances were granted solely within the scope of the New York Supreme Court's jurisdiction and in accordance with the principle more particularly referred to above, i. e., that the court should direct the payments of such allowances as it believed the incompetent would in all probability have made if she had been of sound mind (R. 287; 169; 172; 275; 287).

The records of the allowance proceedings further show that the New York Supreme Court Justices who granted the allowances, Judge Lydon and Judge Ingraham, in seeking to ascertain what the incompetent would have done, took into account:

> (a) the generous and affectionate attitude of the incompetent toward her two daughters and her grandchildren (R. 134-135; 138; 166; 168-169; 226-227; 229-230; 231-232; 274);
>
> (b) the luxury in which the incompetent's children were raised (R. 166; 229-232);
>
> (c) the large increase in her income during the period of her incompetency (R. 147; 163; 234; 256-259; 275-278);
>
> (d) the station in life of the incompetent and her descendants, the evidence showing that the incompetent was the widow of Charles F. Houghton and that the income from his estate which she enjoyed was very large (R. 132-133; 147; 255-259), that she maintained at least three luxurious homes, having an aggregate appraised value in excess of $600,000 (R. 149-150), that she owned personal jewelry appraised at $177,418 (R. 150), that prior to her incompetency she lived in general luxury (R. 230-232; 307), and that this lavish mode of living was participated in by her daughters prior to their marriages

and thereafter during the period of decedent's sanity (R. 230-232; 226-227; 241-243; 305-306);

(e) the incompetent's well-defined practice of equalizing her gifts between the two branches of her immediate family (R. 135; 137-138; 166; 304); and

(f) in the case of the incompetent's collateral relatives, their need, as well as her past practice toward them, was taken into account and quite properly so, in ascertaining what the incompetent would in all probability have done for them (R. 112-130; 167).

Excepting that Mrs. Vail's disease was mental, the picture presented to the New York Supreme Court Justices when the applications for allowances were made was no different from that of any person possessed of a large income who, through physical, though not fatal, incapacity or other circumstances, finds his living requirements very much reduced and at the same time finds his income much increased. If the New York Supreme Court concluded under all the circumstances that the incompetent, having no further personal use during her incompetency for a portion of her increased income, would in all probability have turned parts of that portion over to her daughter and to her grandchildren, as well as to her brother and sisters, for their current use, how can it be said that the allowances were substitutes for testamentary dispositions?

In determining what the incompetent would in all probability have done by way of granting allowances, the New York Supreme Court Justices properly considered all the *indicia* that were before them when the allowance orders were made (*supra*, pp. 27-28). The Courts below, however, in concluding that all the allowances had been transferred in contemplation of death save for $6,000 per annum to each branch of the decedent's family, based their conclusion on one only of such *indicia*, namely, the regular annual allowance of $6,000 each which the decedent had made to her daughters long prior to incompetency and attributed one motive to the granting of these amounts and an entirely dif-

ferent and distinct motive to the granting of the balance.[4] The conclusion is inescapable that what the Courts below took upon themselves to do was to sit as some sort of a court of review to determine the propriety of the *quantum* of the allowances granted by the New York Supreme Court Justices, which, of course, they were not called upon, nor had any jurisdiction, to do. (See Point IV, *infra*, p. 36 ff.)

Under the New York law, its Supreme Court in the exercise of its equitable jurisdiction in granting allowances, is not limited to the amount or amounts which the incompetent had given antecedently while sane. That, as above stated, is but one of many factors. For example, in one of the several cases in which applications for allowances out of the surplus income of Mrs. Flagler were made, there was no evidence that any allowance or gifts whatsoever had been made by Mrs. Flagler, while sane, to the person applying for the allowances. Yet the court had no hesitance in granting them. *Matter of Flagler* (Tash), 126 Misc. 764 (N. Y. Supreme Ct., 1926), 214 N. Y. Supp. 631. It cannot now be said here by way of collateral attack on the allowance orders that the New York courts granted these allowances in amounts greater than "the lunatic would, in all probability, have made" if she had been "of sound mind." The mere fact that the allowances were substantially greater than the regular annual cash allowances given by this in-

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[4] Both of the Courts below overlooked the abundant evidence in the Record that in addition to the regular annual allowance of $6,000 to each daughter, the incompetent had on numerous occasions while sane made substantial additional gifts of money, property and money's worth. For example, at one time she gave each daughter a residence at a cost of $30,000 each (R. 135; 166; 232); she gave her daughters wedding presents (R. 134; 166; 232) and other cash gifts (R. 134; 135; 166; 232), money for extensive trips (R. 229; 231), paid for fashionable schools (R. 231) and expensive jewelry (R. 232; 303-304).

competent while sane does not make the excess testamentary in nature as the Courts below have held. And it is not within the province of the Treasury Department or of the Federal courts to impose a sanction on the free exercise of the equitable jurisdiction of the state courts in granting allowances by taxing such allowances as gifts in contemplation of death to the extent that they exceed either what the incompetent had given while sane, or what the Federal courts believed the incompetent probably would have given if she had been sane and in her then circumstances.

(b) The evidence shows complete absence of any purpose to provide for the recipients of the allowances at or after the death of the incompetent.

The main, if not sole, consideration which motivates a testator to make a testamentary disposition is his desire to make provision for the objects of his bounty after his death. In *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. (2d) 940 (C. C. A. 2nd, 1943), *cert. denied*, 320 U. S. 744 (1943), the Court which decided the instant case below pointed out the clear distinction under the Federal Estate Tax Law between a gift dictated by a desire to dispose of the property for beneficial use before the donor's death and a gift dictated by a desire to dispose of it for beneficial use after the donor's death and it stated at page 942 that the *Wells* case (*supra*, p. 12), "laid it down that in such situations the inclusion of the property within the donor's testamentary estate depends upon which of the two motives preponderates."

The evidence in this case shows conclusively that the allowances were not granted for the purpose of providing for the beneficiaries after the incompetent's death. In the first place, the allowances ceased automatically with the incompetent's death. Also, the New York Supreme Court in both of the allowance proceedings was well aware that under the terms of the will of the late Charles F. Houghton (the incompetent's first husband) both Mrs. Plumb and the Har-

ris children would be amply provided for from the very moment of the incompetent's death (R. 132-133; 151-152; 163-164; 168; 239; 255-258; 273; 274; 278). How then is it possible to infer that the allowances were intended as distributions, in advance, for the purpose of making provisions for the recipients after the death of the incompetent?

In every contemplation of death case which we have discovered, the alleged substitute for the testamentary disposition has consisted of a block of securities, or a lump sum, or the like, which, had no transfer been made, would presumably have been found in the transferor's estate at death. The instant case is unique in that the allowances (except the retroactive increases thereof which came out of accumulated surplus income) were directed to be paid in recurring quarter-annual instalments out of surplus *income*, and were, of course, dependent upon the continued lives of the incompetent and the respective donees; and likewise contingent upon there being sufficient surplus income to meet the payments. Had the incompetent herself made these allowances for purposes associated with life, how could it be said that they were substitutes for testamentary dispositions? Death has no place in this picture.

Nor were the allowances substitutes for testamentary dispositions within the doctrine of *Farmers Loan & Trust Co.* v. *Bowers*, 68 F. (2d) 916; *id.*, 98 F. (2d) 794 (C. C. A. 2nd, 1938), *cert. denied*, 306 U. S. 648 (1939), "The Astor Trust Case", as applied to the instant case by the Circuit Court of Appeals (R. 439). The theory that they were such substitutes because "made by one who could not enjoy the income during her life, but who must let it roll up and pass upon intestacy", (R. 439) wholly ignores and is in conflict with the only justifiable basis upon which the New York Supreme Court could grant such allowances, namely, that the incompetent would in all probability have made such payments if she had been of sound mind (See p. 23, *supra*).

That the surplus income of the incompetent which provided the allowances granted by the New York Supreme

Court, could never be used by the incompetent and that it was found to "roll up" and pass on her death to the recipients of the large allowances is, of course, mere conjecture. The recipients might well have died before the incompetent. Also, the incompetent might have, contrary to expectations of her physicians, recovered her sanity. Furthermore, her large income might unexpectedly have substantially diminished. In the first and second of these events, the allowances under the court orders would necessarily have automatically ceased. In the third of these events, the allowance orders would have been subject to being vacated or modified if the shrinkage in income resulted in there being insufficient income to care for the incompetent and her property, to pay her income taxes and pay the allowances as fixed in the original orders. In other words, the orders were contingent and revocable and were not by any means bound to continue, in full effect, or at all, until the incompetent's death.

It is significant to note in this connection that transfers in contemplation of death are included within the same category, indeed, in the very same phrase of the Estate Tax Law, as transfers intended to take effect at or after the death of the transferor (Internal Revenue Code, Section 811 (c); printed in Appendix, p. 45, *infra*).

In *Milliken* v. *United States*, *supra*, at p. 23, this Court said:

> "It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. * * *"

(c) The evidence shows that there was no purpose to avoid Federal Estate Tax.

Since the allowances were granted by the New York Supreme Court, it is inconceivable that they were motivated by any purpose of avoiding Federal Estate Tax. Certainly, they could not have been motivated by any such purpose with respect to the Estate Tax of New York, the Court's own sovereign, the law of which, in so far as the taxation of transfers in contemplation of death is concerned, is virtually identical with Section 811 (c) of the Internal Revenue Code (Article 10-c, Section 249 r. (3) of the New York Tax Law, printed in Appendix, p. 52, *infra*). We would hesitate even to interpose such a suggestion except for the significant fact that the presence or absence of a tax avoidance motive is a most important and usually controlling criterion in determining whether a gift is a transfer in contemplation of death under the Federal Estate Tax Law. That the motive of tax evasion is regarded as of prime importance in determining whether or not a gift is in contemplation of death is scarcely surprising, in view of the repeated pronouncements by this Court that the dominant purpose of the statute is to prevent the evasion of the estate tax.

U. S. v. *Wells*, 283 U. S. 102, 116 (1931);
Milliken v. *U. S.*, 283 U. S. 15, 23 (1931).

In *United States* v. *Cambridge Loan and Building Company*, 278 U. S. 55 (1928), at p. 59, this Court said that a State, through its legislature, "is not likely to be party to a scheme to enable a private company to avoid federal taxation * * *." We submit that it is even less "likely" that a state court of equity would be a party to such a scheme.

(d) The Record contains no evidence of testamentary motive.

The incompetent was physically in good condition at the time of the first allowance proceeding and this fact was established by uncontroverted expert testimony in those

proceedings (R. 108). Her mental condition was described by Dr. Riley as "somewhat delapidated" and he stated that due to an arterio-sclerotic condition of the brain, she was suffering from senile dementia and senile chorea (R. 109). There was, however, no evidence whatever before Judge Lydon that the incompetent's condition was such that an early death might be expected and this Court may take judicial notice of the well known fact that insane persons, when properly cared for, are likely to live as long, if not longer, than persons of sound mind. Indeed, if there had been any indication that the incompetent was soon to die, it is difficult to imagine her daughter ever instituting the allowance proceedings or why the Court should have granted the allowances, since they were wholly contingent on the continued life of the incompetent. The fact that she was not likely to recover (R. 195-196) was not an indication of an early demise but was an indication of permanent incompetency, a fact very pertinent to these proceedings since, if she should recover her mental power, the basis for the allowances granted by the Court, would disappear.

The incompetent was seventy-one years of age at the time the allowances were instituted by the court order of January 14, 1927 and this fact was brought out in the allowance proceedings (R. 112; 395). Decisions of this Court, the Circuit Court of Appeals and the Board of Tax Appeals have made it clear that seventy-one is far from a sufficiently advanced age to be an indication of contemplation of death. It has frequently been held that gifts made by donors in their eighties—and occasionally even in their nineties—were not made in contemplation of death. See, for example:

Colorado National Bank et al. v. *Commissioner*, 305 U. S. 23 (1938)—Age 80;

Commissioner v. *Nevin* (Wanamaker Estate), 47 F. (2d) 478 (C. C. A. 3rd, 1931), *cert. denied*, 283 U. S. 835 (1931)—Age 84;

Heiner v. *Donnan*, 285 U. S. 312 (1932)—Age 82;

Wishard v. *U. S.* (D. C. S. D. Ind. May 28th, 1943), C. C. H. Inheritance Tax Service 7th Ed., Par. 10,050 (not officially reported)—Age 82;

Rochester H. Rogers, Executor (Estate of Clinton Rogers), 21 B. T. A. 1124 (1931)—Age 91;

Willard Foster, et al., Executors v. *Commissioner*, 25 B. T. A. 414 (1932)—Age 85;

Topliffe, Administratrix v. *Commissioner*, 39 B. T. A. 13 (1939)—Age 84;

Estate of Charles L. Murfey, Latham W. Murfey, Administrator, B. T. A. Memorandum Opinion March 18, 1941, Prentice-Hall 1941, Federal Tax Service, Par. 64,387 (not officially reported)—Age 86.

The Circuit Court of Appeals recognized that some testamentary motive must be found (R. 438) and primarily rested the existence of such motive on the proposition, first, that the gifts were made by one who could not enjoy the income during her life (R. 439), and second, that the decedent had no power to dispose of the amounts covered by the allowances (R. 440). The Court in passing also commented on certain remarks of counsel for certain of the parties which were made in hearings before one of the referees. While it would appear obvious that such remarks could not be imputed to any court in determining its motive or reason for making an order (*Fayerweather* v. *Ritch*, 195 U. S. 276, 306-7 (1904); *U. S.* v. *Morgan*, 313 U. S. 409, 422 (1941)), the majority Court below apparently attributed little consequence to this, as is evidenced by the fact that when it came to discuss the allowances paid to the collateral relatives, as to whom those remarks were non-applicable, it reached the same conclusion as it did with respect to the allowances paid to the daughter and grandchildren, simply because there was no power in the incompetent either of enjoyment or disposition. If lack of power to enjoy or dispose be in and of itself sufficient to subject an allowance or other transfer to tax as

being in contemplation of death, then every allowance paid from the estate of an incompetent person would, of necessity, be so taxable, as is more fully pointed out at pp. 41-42, *infra*.

There is no substantial evidence in the records in the allowance proceedings indicating that the allowances were transfers in contemplation of death, and any effort on the part of the Government to derive comfort from the remarks of counsel above referred to vanishes before the legal presumption that the New York Supreme Court acted within its jurisdiction, which did not embrace the power to make a testamentary disposition of the surplus income or any other property of the incompetent. *Voorhees* v. *Bank of United States* (*supra*, p. 26).

POINT IV

The Court below erred in assuming to sit as a court of review of the New York Supreme Court and in finding, in effect, that the orders made by that Court were beyond its jurisdiction and in abuse of its discretion.

It is apparent, from a reading of the decisions of both the Courts below, that they were of the opinion that the New York Supreme Court should not have granted annual allowances, first of $50,000 and then of $75,000, to each of the two branches of the incompetent's immediate family, since the records in the allowance proceedings showed that the incompetent herself had, while sane, paid her two daughters regular cash allowances of only $6,000 each annually (R. 134-135). On the basis of this conclusion both of the lower Courts held that the annual allowances, first of $50,000 and then of $75,000, were not in contemplation of death to the extent of $6,000, but that the balance of the allowances over and above $6,000 annually were in contemplation of death. Stated otherwise, the District Court and

the Circuit Court of Appeals below have held, contrary to the specific findings in the orders of the New York Supreme Court granting the allowances, that the incompetent would *not* have desired "that the allowance hereinafter fixed be made to the persons hereinafter designated," and would *not* have made "such allowances to such persons out of her property," had she been sane. The Courts below have thus overruled the New York Supreme Court which had sole jurisdiction to determine, on the records before it, what the incompetent, if sane, would have done if her daughters had asked her for the payments for which application was made to the New York Supreme Court. Such action on the part of the Courts below is erroneous, arbitrary and a clear departure from the accepted and usual course of judicial proceedings, and should not be permitted.

This was a matter of local law and the Federal courts were not at liberty to substitute their judgment for that of the State court. Thus, in *Helvering* v. *Stuart*, 317 U. S. 154 (1942), at p. 161, this Court states, in an opinion by Mr. Justice Reed, applying the law of the State of Illinois:

> "* * * The power to transfer or distribute assets of a trust is essentially a matter of local law. *Blair* v. *Commissioner*, 300 U. S. 5, 9; *Freuler* v. *Helvering*, 291 U. S. 35, 43-45. * * *"

And again, in the same opinion, this Court stated at page 164:

> "* * * If reasonably avoidable we should certainly avoid becoming a Court of first instance for the determination of the varied rules of local law prevailing in the forty-eight states. * * *"

There is absolutely no basis whatsoever for this splitting, as between sums under and above $6,000 per annum, of the alleged intent of the New York Supreme Court in granting the allowances. There is nothing in the two refer-

ees' reports (R. 161, ff.; 271, ff.), nor in the two orders granting the allowances (R. 13, ff.; 18, ff.) to indicate that in the case of either order the New York Supreme Court gave any different consideration to, or had any different intent respecting, the allowances to the extent that they were below $6,000 and the allowances to the extent that they exceeded that sum. No reference to the figure of $6,000 per annum is found in either of the two allowance orders, and there is no basis in law for drawing any distinction between the allowances in so far as they were less than or exceeded $6,000 per annum.

In the first place, under the equity principles prevailing in New York, its Supreme Court was not limited in granting the allowances to the regular annual cash allowances which the decedent had given them while sane, even if she had not made other substantial additional gifts during her competency. (See Point II, *supra*, p. 17 ff.) But she did make very substantial additional gifts in money, property and money's worth (R. 135). (See footnote 4, p. 29, *supra*.) Furthermore the records before the New York Supreme Court show that in the year in which the first allowances were applied for, the incompetent's income was $651,000, as against $308,000 in 1925, the year before. (R. 163.) Such a tremendous increase would in and by itself justify a court of equity in granting larger allowances than had been paid by the incompetent when sane and when her income was less than half of what it was in the year in which the application for the allowances was made (R. 14). In addition to these factors the incompetent, because of her

enforced physical inactivity, resulting from her confinement to a sanatorium, was prevented from maintaining and living in her three residences and was prevented from spending money for traveling, recreation, from making gifts and from otherwise spending her funds in the normal way followed by a person of normal activities. Thus, ample reason will be found for justifying the increase from $6,000, which was only a part of what the incompetent had given to her daughters while she was sane, to $50,000 and $75,000 after her commitment.

It seems most natural and in accordance with common human experience that a person enjoying a rapidly and very substantially increasing income, restricted by circumstances beyond her control in the use thereof, should wish the natural objects of her bounty to have the current enjoyment and use of income which could be of no benefit or enjoyment to her. Certainly in the case of sane people allowances of income which they cannot make use of to their sons and daughters or other near relatives are made every day without any challenge that they are transfers in contemplation of death, and to the extent that such allowances exceed the exemptions, they are taxed under the Gift Tax Law. The very word "allowance" imports life, not death.

POINT V

The Circuit Court of Appeals erred in including in the taxable estate allowances paid to the collateral relatives of the incompetent with resulting discrimination between estates of incompetents and those of sane persons in violation of the Fifth Amendment.

The New York Supreme Court order of January 14, 1927 directed the payment of small annual allowances to the four sisters and the brother of the incompetent (herein referred to as the collaterals) (R. 16). These allowances aggregated $65,366.67 (R. 26-34).

The Record contains uncontradicted evidence of the financial need of these collaterals (R. 112-131). Much of this evidence was introduced in the form of letters written by them or in their behalf. The District Court was of the opinion that these were not competent evidence (R. 396). Clearly, whether or not these letters were competent evidence, was a question for the sole and exclusive determination of the New York Supreme Court, the forum of the proceeding. But even assuming that the State court improperly admitted evidence in the allowance proceeding, it by no means follows that the Federal court could or should find that allowances to collaterals which may have been based upon such evidence constituted gifts in contemplation of death.

In cases where allowances for collateral relatives are proposed, a court quite naturally explores the question of need and it may be a determining factor in the granting and fixing of such an allowance, because the court may well find no other reason or motive which would have induced the incompetent to make such allowance.

It is respectfully submitted that the apparent and dominant motive for granting the small annual allowances to the

collaterals was to alleviate their acute financial distress. Such a motive is associated with life, not death.

The majority of the Circuit Court of Appeals frankly expressed doubt of the application of the law to the allowances to the collaterals but, nevertheless, subjected them to the tax. In taxing the allowances to the daughter and grandchildren, who were in the line of succession, one of the principal factors relied upon by the Court below was that testamentary motive was to be inferred from the fact that these persons were the ones who would inherit the decedent's property in case of her death intestate. The taxation of the allowances to the collaterals, who would not inherit, obviously has no such support.

Thus, the Circuit Court of Appeals was squarely faced with the situation where there was no evidence in the Record of any kind as to testamentary purposes with reference to the allowances to be paid to the collaterals. Nevertheless, the Court stated as the basis of its decision as to this part of the case:

> "It is true that the allowances made to the brother and the sisters were not substitutes for that disposition of the property which would otherwise have taken place; on the contrary they diverted the money from those who would otherwise receive them. And yet it seems to us that it is enough to carry them along with the allowances to the daughter and grandchildren that the property transferred was beyond any power of the donor to enjoy, as were the remainders in The Astor Trust Cases; and that it was in addition beyond her individual power of disposition. Although they were not substitutes for the inevitable devolution of the property had they not been made, they were certainly testamentary in their character, and they were actuated by a motive of the sort that leads to testamentary dispositions. With less confidence as to these, we hold that they were also gifts 'in contemplation of death' within § 302 (c)." (R. 441).

The decision therefore construes the Act as being applicable to any transfer of property where (a) the owner himself could not enjoy the property and (b) where the owner himself could not dispose of the property. The effect of this decision, if permitted to stand, would be to render taxable, as a transfer in contemplation of death, every allowance paid out of an insane person's surplus income, inasmuch as such allowances may only be ordered by the court where provision is first made for the insane person's own needs. Thus no surplus income so transferred could ever be "enjoyed by the incompetent," and by hypothesis the incompetent could never himself dispose of it.

The necessary result of the decision, therefore, is to hold that while sane persons may make transfers which are not taxable as gifts in contemplation of death, every transfer made out of the surplus income of an insane person is taxable as such. No language can be found in the statute nor any intent on the part of Congress enacting it which would support the conclusion that the estates of insane persons are to be discriminated against in any such fashion. The statute, as construed by the majority Court below, would make such an arbitrary and capricious discrimination against estates of insane persons as a class as to render it violative of the due process clause of the Fifth Amendment of the Constitution of the United States.

Nichols v. *Coolidge*, 274 U. S. 531 (1927);
Hoeper v. *Tax Commission*, 284 U. S. 206 (1931);
Heiner v. *Donnan*, 285 U. S. 312 (1932);
Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 83, 92 (1935).

Conclusion

It is respectfully submitted that the allowances are not includible in the decedent's taxable estate as transfers made in contemplation of death. The judgment of the District Court, which was affirmed by that of the Circuit Court of

Appeals, should be modified and judgment directed to be entered for the petitioner in the sum of $466,912.27, the amount demanded in the complaint, with interest on said sum of $466,912.27 from June 22, 1938.

Respectfully submitted,

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Appendix

Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of Internal Revenue Code.

"SEC. 811. GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *

"(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *"

Treasury Department Regulations 80 (approved Nov. 7, 1934):

"ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an

adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers subsequent to the enactment of the Revenue Act of 1916 made in contemplation of death (see article 16); (2) transfers resulting from an arrangement, whether made before or after the enactment of the Revenue Act of 1916, if title was not to pass from the decedent to the beneficiary unless the latter survived the former, or title, having passed, was to be divested and the property returned to the decedent if the beneficiary predeceased him (see article 17); (3) transfers made after the enactment of the Revenue Act of 1916 in the case possession or enjoyment was retained by the decedent (see article 18 and the exception stated therein); (4) transfers in which the decedent retains, either alone or in conjunction with any person or persons, the right to designate who shall possess or enjoy the property or the income thereof, if made after the enactment of the Revenue Act of 1916 (see article 19 and the exceptions stated therein); and (5) transfers made before or after the enactment of the Revenue Act of 1916 in which the enjoyment of the transferred property was subject at decedent's death to any change through the exercise, either by decedent alone or with other person or persons, of a power to alter, amend, or revoke, or if after the enactment of the Revenue Act of 1916 such a power was relinquished by the decedent in contemplation of death (see articles 20 and 21).

"The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

"To constitute a bona fide sale for an adequate and full consideration in money or money's worth it must have been made in good faith, and the price must have been an adequate and full equivalent, and reducible to a money value. If the price was less than an adequate and full equivalent only the excess of the fair market value of the property, as of the date of the decedent's death, over the price received by the decedent should

be included in the gross estate. For the purposes of the estate tax a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

"In the case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof should be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. If the decedent was a nonresident, only one copy, certified or verified, need be filed.

"All transfers made by the decedent during his life of an amount of $5,000 or more, except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a brief statement of the pertinent facts should be made.

"ART. 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

"A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase 'contemplation of death' as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be 'contemplated,' that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

"As the phrase 'transfer in contemplation of death' is applicable to many varying transactions, the circumstances of each case must be examined to ascertain the motive which induced the decedent to make the trans-

fer. If the transfer results from mixed motives, one of which is the thought of death, the more compelling motive controls. A condition of the mind or body of the transferor (whether occasioned by old age or disease) which naturally prompts a testamentary disposition to a proper object of his bounty, will be considered a decisive test of contemplation of death in the absence of proof of the existence of purposes associated with life as the dominant motive for the transfer.

"Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death. This provision applies even though the decedent died subsequent to the effective date of the Revenue Act of 1926 and prior to the effective date of the Revenue Act of 1932. (The conclusive presumption of contemplation of death as described in the second sentence of section 302(c) has been held to be void by the Supreme Court of the United States.)

"If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

"The fact that a gift was made as an advancement to be taken into account upon the final distribution of the decedent's estate is not, in and of itself, determinative of its taxability."

Revenue Act of 1932, Sections 501 and 503.

"SEC. 501. IMPOSITION OF TAX.

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

"(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

"SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

"Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

NEW YORK CIVIL PRACTICE ACT, SECTIONS 1356, 1357, 1358, 1377, 1382, 1383.*

"§ 1356. JURISDICTION OF SUPREME COURT; CONCURRENT JURISDICTION OF COUNTY COURT. The jurisdiction

* The citations from the New York Civil Practice Act are derived from Clevenger's Annual Practice of New York, 1944 Edition. The sections cited are substantially in the same form in which they existed in the years 1927 and 1932, respectively, the years in which the allowance orders were granted.

of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article.

"§ 1357. DUTY OF COURT HAVING JURISDICTION. The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family.

"§ 1358. JURISDICTION OF COURT TO BE EXERCISED BY COMMITTEE; [1]DESIGNATION OF CLERK.[1] The jurisdiction specified in this article, must be exercised by means of a committee of the person, or a committee of the property or of a particular portion of the property, of the incompetent person, appointed as prescribed in this article. The committee of the person and the committee of the property may be the same individual or different individuals, in the discretion of the court. [2]Every individual [3]*appointed as committee*[3] shall file in the office of the clerk of the court an instrument acknowledged or proved, and duly certified designating the clerk of the court and his successor in office, on whom service of any process issuing from the court may be made in like manner and with like effect as if it were served personally upon himself, whenever the individual so named as committee under the provisions of this article cannot be found and served within the state of New York, after due diligence used.[2] [4]*The clerk of the court shall thereafter issue the commission to the individual appointed as committee.*[4] [Am. L. 1935 ch. 155, in effect Sept. 1; L. 1939 ch. 617, in effect Sept. 1; L. 1943 ch. 535, in effect April 16.]

"Amendments:

—L. 1935 ch. 155 added matter at fig. 1s and 2s.

—L. 1939 ch. 617 added matter deleted by L. 1943.

—L. 1943 ch. 535 added matter at fig. 3s and 4s; and deleted at fig. 3s "before a commission is issued to him by the clerk of the court pursuant to the order appointing said individual as committee,".

"§ 1377. CONTROL, DUTIES AND POWERS OF COMMITTEE. A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal or resignation may be filled by the court. But a committee of the property cannot alien, mortgage or otherwise dispose of real property, except to lease it for a term not exceeding five years, without the special direction of the court obtained upon proceedings taken for that purpose, as prescribed in this [act].

"A committee of the property may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained if the appointment had not been made."

"§ 1382. RESTORATION OF PROPERTY. Where a person with respect to whom a committee is appointed, as prescribed in this article, becomes competent to manage himself or his affairs, the court must make an order discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property remaining in the committee's hands. Thereupon the property must be restored accordingly.

"§ 1383. DEATH OF INCOMPETENT; DUTY OF COMMITTEE. Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, *shall* render to the court by which he was appointed a final

account of his proceedings touching the property of the incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. [Am'd by L. 1935, ch. 724, in effect Sept. 1.]"

New York Tax Law, Article 10-c Section 249-r (3).

"§ 249-r. GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

* * * * * * * *

"3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (a) the possession or enjoyment of, or the right to the income from, the property or (b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property made by the decedent within two years prior to his death, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

* * * * * * * * *"

No. 294

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

Petitioner,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

REPLY BRIEF FOR PETITIONER

In the interest of accuracy, we desire to point out that on several instances respondent refers to the allowances made to the decedent's daughter and others either as having been made out of the incompetent's *estate*, or as *distributions of her property* (Res. Br., pp. 2, 11, 12, 14, 17, 29, 35). We would point out that in no instance was the *principal* of the incompetent's estate to be expended under either of the allowance orders; they specifically provided that all of the allowances were to be paid out of *income*.

ARGUMENT

1. The Respondent's contention that the New York courts have the power to make substitutes for testamentary dispositions.

Respondent concedes, and the decisions so hold, that the New York Supreme Court has no jurisdiction to make a testamentary disposition of an incompetent's property, but respondent asserts that such court is fully authorized to make a substitute for such disposition, upon the finding that the incompetent, if competent, himself would have done so. Thus respondent must concede that even though it were proved that an incompetent shortly before the loss of his sanity had prepared and finally approved a last will and testament and in the last moments of his sanity was about to execute it, a state court nonetheless would have no jurisdiction to validate the will on the incompetent's behalf.

As respondent asserts (Res. Br., p. 31) the effect of the Federal Estate Tax Law is to cover all *inter vivos* gifts that are made "with the same motives as generally lead to testamentary dispositions." If the New York courts have not the power to make testamentary dispositions, they certainly have not the power to make *any* transfer prompted by the same motives as are testamentary dispositions.

And yet respondent urges that upon the facts of a stated hypothetical case (Res. Br., pp. 19-20) the state court would have the power to put into effect a substitute for a testamentary disposition which the court found the incompetent might formulate if sane. Since the New York courts admittedly have no power to make a direct testamentary disposition, it necessarily follows that they do not have the power to make a substitute therefor. The machinery erected by the New York law for the conservation of in-

competents' estates clearly precludes the making of substitute, as well as actual, dispositions of this character.

If respondent's hypothetical case, above referred to, which involves a gift clearly in contemplation of death within the meaning of the Federal statute were before the New York Supreme Court we feel confident that that court would have made short shrift of the application. The court's power is by no means as broad as the incompetent's probable wishes. The general principles of equity will not be applied to frustrate the purpose of the laws or to thwart public policy. Equity will not permit that to be done by indirection which, because of public policy, cannot be done directly. Corpus Juris Secundum, Vol. 30, p. 458; *Knight Products, Inc.* v. *Donnen-Fuel Co., Inc.*, .. Misc. .., 20 N. Y. S. (2d) 135 (1940). cf.: *Tilden* v. *Green*, 130 N. Y. 29, 51-52 (1891).

As respondent asserts, and the decisions hold, the fundamental purpose of the statute is to prevent the evasion of Federal estate taxes (Res. Br., p. 31) and respondent suggests that if allowances of the character here involved made by state courts are not subjected to tax, broad avenues for tax evasion will be opened. We cannot believe that this Court would entertain the view that state courts, even apart from their lack of jurisdiction, would lend their power in aid of such devices.

2. The New York Supreme Court did not in fact make substitutes for testamentary dispositions in this case.

Even if the New York courts had any more power to make substitutes for testamentary dispositions than they have to make actual testamentary dispositions, the orders here under consideration did not in fact constitute such substitutes. No transfer is a testamentary disposition or even a substitute therefor unless the requisite motive be present, namely, the thought of death. In a strenuous effort to find such a motive in this case on the part of the New

York Supreme Court, the courts below and the respondent seized upon certain recitals in the allowance orders and remarks of counsel to the effect that the incompetent had no will and that the recipients of the large allowances were her prospective next of kin and who would probably inherit her property at death.

The fact that the incompetent had no will was important to a determination of whether the recipients of the large allowances were in actuality the principal objects of her bounty, for if she had had a will which left the principal part of her estate to others, considerable doubt would have been cast upon her desire to make large allowances to her daughter and grandchildren.

The first statement of counsel to the effect that the granting of the allowances would affect only the persons who applied for them and that they would eventually get the property upon the incompetent's death, appears in the Record at p. 159. This statement, made by Mr. Montgomery, of counsel for the petitioner, showing who were the natural or expressed objects of the incompetent's solicitude and bounty, was a most necessary element in any determination as to what the incompetent would, in all probability, have done had she been sane. If counsel had been actuated by any motive of inducing the state court to make a testamentary disposition of the incompetent's property (which it was powerless to do) or of evading future Federal estate taxes, it is inconceivable that he would have been so guileless as to have made them.

The second of the remarks of counsel, relied upon by the Circuit Court of Appeals, and by the respondent (Res. Br., p. 27) appears at p. 261 of the Record and reads:

> "* * * It is to me, not a matter of obtaining an allowance. It seems to be the idea of distributing part of this incompetent's property in anticipation more or less of her death."

This remark was made by Mr. Angulo, of counsel for the Committee of the incompetent, in the course of a colloquy between himself, Mr. King, of counsel for the Harris grandchildren, and Mr. Montgomery, of counsel for the petitioner, Mrs. Plumb (R. 261-266). This colloquy among counsel related solely to the question then under consideration of whether the New York Supreme Court had authority to distribute equally, between Mrs. Plumb and the Harris grandchildren, the lump sum of $250,000, which represented a portion of the surplus income accumulated since the granting of the allowances in the 1926 proceeding. Mr. Angulo took the position that the lump sum payment then proposed was not a matter of obtaining an allowance but of distributing part of the incompetent's property. After this colloquy of counsel, the petition in the 1932 allowance proceeding was amended so as to pray for an additional allowance of $25,000, to each branch of the family out of the incompetent's surplus income, such additional allowance to be made retroactive for the past five years (R. 267-268). This was within the power of the New York Supreme Court. *Matter of Heeney*, 2 Barb. Ch. 326 (1847).

While Mr. Angulo, as counsel for the Committee, made general objection to the retroactive feature of the increase, he stated he had none with respect to the prospective feature (R. 268-269). It is important to note, first, that this discussion among counsel had no bearing on the prospective allowances; and, second, that both the Court and counsel were well aware of the lack of power of the court to grant any payments which were substitutes for testamentary dispositions. The point as to whether the retroactive allowances were of the character of distributions of the incompetent's property in anticipation of her death, was thus squarely before the court in the 1932 proceeding and was rejected by that court.

But in the last analysis, even if counsel for the petitioner had the purpose of procuring from the New York Supreme Court an order making transfers in contemplation

of death, and even if counsel for the Committee was of the personal opinion that a lump sum payment or a retroactive increase was a distribution in anticipation of death and therefore beyond the power of the court to make, such purpose and opinion cannot be imputed to the Court, nor can its motive in making the orders be determined on the basis thereof.

Moreover, any comfort which the respondent may derive from these remarks of counsel vanishes before the legal presumption that the New York Supreme Court acted within its jurisdiction which did not embrace the power to make a testamentary disposition or a substitute for a testamentary disposition of an incompetent's property.

The significance with which the Government attempts to invest these recitals in the orders and the remarks of counsel disappears when we consider what the actual decision in this case was. The courts below have taxed only such portions of the large allowances as exceeded $6,000. per annum, which was the amount of the regular cash allowance given by the incompetent to each of her daughters while she was sane. These allowances up to $6,000. were declared by the courts below not to have been made by the New York Supreme Court with any testamentary purpose. Thus, it must be concluded upon the actual decisions below that if, on precisely the same record as we have here, including the recitals in the orders and the remarks of counsel, the New York Supreme Court had granted allowances of only $6,000. per annum, these transfers would not have been taxed as made with a testamentary motive or in contemplation of death. Obviously, there is no real significance in these recitals and remarks of counsel, and they do not in fact constitute any showing of testamentary purpose.

It would seem from the opinions below that the large allowances to the extent that they exceeded $6,000. were taxed by the courts below simply because they did exceed

that amount, and inferences drawn from these recitals and remarks of counsel constitute the only support for such decisions which the lower courts could find. It must be concluded, therefore, that for lack of any testamentary motive such as is required by the Federal Estate Tax Law, the allowances here under consideration were not substitutes for testamentary dispositions, any more than they were actual testamentary dispositions.

Not only was there no testamentary motive in this case, but what motive there was, was clearly associated with life. The very conception of an allowance out of annual income grows out of the contemplation of life, not death. (See also, pages 26-28 of petitioner's brief.) But in a case like this, there is less need to show a specific purpose associated with life than in a case where the transfer is made by an individual. It would appear from the cases that the finding of a specific life motive is merely a ready means for disposing of the possibility of an intent on the part of the donor to evade estate taxes. (See page 13 of petitioner's brief.) However, since it could never be supposed that a state court acting within its jurisdiction would attempt to evade estate taxes, there is no necessity of disposing of such a possibility. While an individual might very well intend to evade estate taxes and attempt to do so in a manner in which he hoped he might succeed, this never could be said of a court acting within its legal powers.

3. The construction of the statute.

The respondent asserts (Res. Br., pp. 37-38) that the proper construction of the statute (Revenue Act of 1926, Section 302 (c)), as applied to this case, is to be found in the majority opinion of the Court below, which said:

> "* * * We are satisfied that the proper construction of the section is as though it read: 'any interest * * * of which at any time a transfer has been made from the decedent in contemplation of death.' We have

> no doubt that if Congress had been faced with a situation like that before us, it would have included payments made by the court out of the property of an incompetent; to hold otherwise would be to frustrate the plain purpose of the section. * * *" (R. 438).

In footnote 12 at p. 38 of respondent's brief is a statement that it does not appear that the dissenting judge in the court below disagreed with the view of the majority on this point.

Yet Judge Swan, in his dissent, said:

> "* * * Whether Congress would wish to impose an estate tax on gifts made out of an incompetent's surplus income by court order for the support and education of his family seems to me the merest surmise. At any rate, it has not said so in language justifying the courts in so holding. * * *" (R. 444).

And again, Judge Swan states:

> "* * * I am unable to find in the words of section 302 (c) adequate language to subject them [the allowances] to the estate tax. * * *" (R. 443).

Clearly, Judge Swan did not believe, as did the majority court, that the allowances fell within the reach of the Estate Tax Law.

4. As to the presumption of correctness of the determination of the Commissioner.

Respondent argues (Res. Br., pp. 33-35) that petitioner has failed to upset the presumption of correctness of the determination of the Commissioner of Internal Revenue that the transfers were made in contemplation of death.

We recognize that the ruling of the Commissioner of Internal Revenue has the support of a presumption of correctness. That presumption, however, is by no means conclusive and if the taxpayer submits evidence to sustain

the burden of proof, that proof cannot be overcome by mere inference, but must be met and overcome by direct evidence.

> *Wickwire* v. *Reinecke*, 275 U. S. 101, 105 (1927);
> *United States* v. *Rindskopf*, 105 U. S. 418, 420 (1881);
> *Wilson* v. *Eisner*, 282 Fed. 38, 42 (C. C. A. 2nd, 1922).

The presumption that the Commissioner's determination is *prima facie* correct means no more than that, in the absence of evidence to the contrary, his action will be upheld, but when such evidence has been adduced the issue depends wholly upon the evidence and the Commissioner's determination is no longer entitled to probative force.

> *First Trust and Deposit Co.* v. *Shaughnessy*, 134 F. (2d) 940, 941 (C. C. A. 2d, 1943), cert. denied, 320 U. S. 744 (1943);
> *Hemphill Schools, Inc.* v. *Commissioner*, 137 F. (2d) 961 (C. C. A. 9th, 1943);
> *Wigel* v. *Becker*, 84 F. (2d) 706, 707-708 (C. C. A. 8th, 1936);
> *Helvering* v. *Talbott's Estate, et al.*, 116 F. (2d) 160, 162 (C. C. A. 4th, 1940).

From the evidence it conclusively appears that the allowances were made for purposes associated with life and not death. The allowances were in expectation of the continued life of Mrs. Vail and not in anticipation of her death. Upon her death her daughter and grandchildren were to receive not from her, but from the estate of Charles F. Houghton, what was theretofore Mrs. Vail's income and the allowances to the collaterals would come to an end. (R. 132) We submit the evidence which the taxpayer has adduced in this case is amply sufficient to meet any burden of proof resting upon the petitioner.

In addition, the proof offered by the petitioner is buttressed by the presumption that the New York Supreme Court acted within its jurisdiction and in making these allowances did not intend the evasion of Federal inheritance taxes.

5. The question of need.

Respondent reiterates that there was no showing of need for the allowances in the daughter and grandchildren of the incompetent (Res. Br., pp. 26, 27).

In our main brief at p. 40, we pointed out that the Record contains uncontradicted evidence of the financial need of the brother and sisters (R. 112-131). And we asserted that in cases where allowances payable to collateral relatives of an incompetent are proposed, a court quite naturally explores the question of need, because the court may well find no other reason which would have induced the incompetent to make such allowance.

However, in the case of gifts or allowances to children of the incompetent, need is of little or no consequence because it is entirely outweighed by other factors such as parental affection, which the court believes would have influenced the incompetent.

In the leading case of *Ex parte Whitbread*, 2 Mer. 99; 35 Eng. Rep. 878 (1816), it was made clear that in dealing with allowances to the wife and children of an incompetent such allowances should be proportioned to the incompetent's circumstances and not based on the need of the children and their right to support.

It is clear that under the Federal Estate Tax Law gifts not in contemplation of death may be, and frequently are, made which are greatly in excess of the financial needs of the donees. In *United States* v. *Wells*, 283 U. S. 102 (1931), the gifts were held not to have been made in contemplation of death although they were obviously greatly in excess of any possible financial need of the donees. For other ex-

amples of *inter vivos* gifts in amounts far in excess of any possible need on the part of the donees which were held not to have been made in contemplation of death, see:

Case	*Amount of Gift*
Commissioner v. *Nevin*, 47 F. (2d) 478 (C. C. A. 3rd, 1931), cert. denied, 283 U. S. 835 (1931)	$36,790,376.17
Rea v. *Heiner*, 6 F. (2d) 389 (W. D. Pa., 1925)	10,306,089.49
Estate of Moir v. *Commissioner*, 47 B. T. A. 765 (1942)	2,924,541.37
Isaac Gimbel, et al., Executors v. *Commissioner*, 11 B. T. A. 214 (1928)	1,406,000.00
Willcuts v. *Stoltze*, 73 F. (2d) 868 (C. C. A. 8th, 1934)	1,335,371.42
American Security & Trust Co., et al. v. *Commissioner*, 24 B. T. A. 334 (1931) (Acquiesced in by Commissioner of Internal Revenue XI-1 C. B. 1)	1,250,195.86
Lippincott, et al. v. *Commissioner*, 72 F. (2d) 788 (C. C. A. 3rd, 1934)	1,066,868.01
Colorado National Bank, et al. v. *Commissioner*, 305 U. S. 23 (1938)	800,000.00

An examination of Articles 15 and 16 of the applicable Treasury Department's Regulations 80, dealing with transfers in contemplation of death, discloses that the Regulations do not even mention "need" of the donee as a test for determining whether transfers have been made in contemplation of death.

Conclusion

It is plain that respondent in seeking to tax these allowances did so, and that he was upheld by the courts below, merely because the New York Supreme Court granted the allowances in amounts substantially larger than the regular annual cash allowances the incompetent had given while sane.

Recognizing that this fact alone would not support the tax, the courts below and the respondent have evolved a number of different, and in some cases mutually exclusive, theories. The District Court imposed the tax on a theory which was rejected by the Circuit Court of Appeals which adopted a different theory. Respondent, now apparently discontent with both, urges that this Court adopt a third theory which, incidentally, respondent did not argue in either of the courts below.

The true explanation for respondent's action and the decisions of the courts below, seems to be that they felt the New York court had abused its discretion in making such an increase and that, for one reason or another, this should subject such increase to tax. The proof of this is that only the increases have been held taxable. There is also further proof at page 22 of his brief in this court, where respondent says:

> "* * * But the records in the allowance proceedings will be searched in vain for any justification for the increases other than that, assuming the decedent to be competent, she would be motivated in making the transfer by a purpose to substitute them for the distribution of her property which would occur at her death and as a result thereof." * * *"

On this point, the decision of the District Court was as follows:

> "If I had the authority to change the allowances as made by the orders of the state court to the direct

> heirs by reducing them below $75,000 but exceeding $6,000 in some amount, I would be disposed to do so. I do not believe that I have the authority to do so." (R. 398).

The following is from the opinion of Judge Hand:

> "* * * for the judges had no evidence whatever from her past conduct for supposing that, if she looked forward to ending her life in full possession of her faculties, she would have given away every year to her daughter, her grandchildren and her brother and sisters, more than $160,000 out of the $250,000 which remained to her after paying her taxes and expenses. The allowances she had theretofore made did not remotely approach such figures." (R. 438).

As pointed out in petitioner's brief, there is nothing in the principles of New York law or equity as applied by the New York courts, limiting them to granting allowances in only the amount which the incompetent had given while sane. As Lord Eldon said in *Ex Parte Whitbread*, 2 Mer. 99; 35 Eng. Rep. 878 (1816),

> "* * * So also, where the father of a family becomes a lunatic, the Court * * * makes an allowance for them proportioned to his circumstances. * * *"

The amount is in the discretion of the equity court and is certainly not subject to review collaterally by the Federal courts in an action involving the Estate Tax on an incompetent's estate.

The respondent and the courts below overlooked (1) the substantial gifts made to her daughters by the incompetent from time to time while sane in addition to the regular annual cash income of $6,000, to each (See petitioner's brief, p. 29 and respondent's brief, p. 4); (2) the tremendous increase in the incompetent's income during the last year or so before her commitment, and particularly the great increase which took place in 1926, the year of the

first allowance application (R. 147); and (3) her greatly curtailed ability to use her income herself (See pp. 38 and 39 of our main brief).

But even if the New York Supreme Court abused its discretion (which we do not concede) in granting allowances substantially greater than the annual cash allowances the incompetent had given while sane, that does not make the allowances so transferred *ipso facto* in contemplation of death. The boundaries of the New York Supreme Court's jurisdiction and of the scope of the Federal Estate Tax Law are not co-extensive, and by the mere act of exceeding its jurisdiction, a state court does not automatically bring the transfers made by its orders within the scope of transfers in contemplation of death. A motive or intent to exceed its powers is not the testamentary motive or intent required by the Federal statute.

The case boils down to this: The New York Supreme Court is empowered to grant such allowances out of the surplus income of an incompetent's estate as it finds, on the record before it, that the incompetent would probably have granted himself if sane. The situation, then, is no different from that of a wealthy individual who, let us say, becomes blind and although contemplating a long life is no longer disposed to maintain expensive residences and a luxurious standard of living which he has theretofore shared with his children. As a result, his surplus income accumulates. If, under these circumstances, he determines to allow a portion of his surplus annual income to his childr n so as to give them greater advantages in living or permit them to procure the facilities he can no longer furnish for them, can it be said that although a grant of 5% of such surplus income springs from a life motive, any amounts above such percentage are to be deemed to be transfers in contemplation of death? How can the required motive be measured or determined by the number of dollars involved? Or by generosity as opposed to parsimony? Yet that is precisely

what the courts below have held and respondent now urges. We submit that their positions are insupportable.

If the decisions below should be affirmed, it is feared that the result would be to restrict state courts in the proper exercise of their equity jurisdiction in granting allowances. No state court could thereafter entertain applications for allowances without the fear that it might be doing something which would subject the incompetent's property passing at death to an estate tax on account of the allowances. Certainly no state court would feel free to grant any allowances in excess of the cash allowances which it found the incompetent had given while sane, and in cases where there was no proof of any prior allowance given by the incompetent, the state courts would not feel free to grant any allowance. As has been shown at p. 29 of petitioner's brief, under the New York law, that of other states and the common law, courts are not restricted to what the incompetent herself had given while sane. They may even grant allowances to persons to whom the incompetent gave nothing while sane.

See for example:

Matter of Flagler, 248 N. Y. 415 (1928);
Sheneman v. *Manring, et al.*, 152 Kan. 780 (1940);
Matter of Carysfort, 1 Cr. & Ph. Rep. 76 (1840).

But the result of the decisions below, if affirmed, would be to deny such power. Thus there would be a restriction imposed by way of indirect sanction by the Federal Government and Federal courts, upon the equity powers of the state courts, resulting in discrimination under the Federal Estate Tax Law to the prejudice of the estates of incompetent persons which should not be permitted under the Fifth Amendment of the Constitution of the United States.

* * * * * *

It is respectfully submitted that the allowances are not includible in the decedent's taxable estate as transfers made in contemplation of death. The judgment of the District

Court, which was affirmed by that of the Circuit Court of Appeals, should be modified and judgment directed to be entered for the petitioner in the sum of $466,912.27, the amount demanded in the complaint, with interest on said sum of $466,912.27 from June 22, 1938.

Respectfully submitted,

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FILE COPY

No. 294

In the Supreme Court of the United States

OCTOBER TERM, 1944

CITY BANK FARMERS TRUST COMPANY, FORMERLY KNOWN AS THE FARMERS' LOAN AND TRUST COMPANY, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HELEN HALL VAIL, DECEASED, PETITIONER

v.

GEORGE T. MCGOWAN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-EIGHTH COLLECTION DISTRICT, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 387–400) is reported in 43 F. Supp. 790, and the opinions of the Circuit Court of Appeals for the Second Circuit (R. 436–444) are reported in 142 F. 2d 599.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1944 (R. 444–445). The

petition for a writ of certiorari was filed on July 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain allowances made to the decedent's daughters and others in the decedent's lifetime out of her estate pursuant to orders of the Supreme Court of New York, the decedent having been adjudged an incompetent, are includible in her gross estate under the contemplation of death provision of Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 20–22.

STATEMENT

This is a suit against the Collector of Internal Revenue for the recovery of federal estate taxes paid by the City Bank Farmers Trust Company, as administrator of the estate of Helen Hall Vail (R. 2–12), who died on December 27, 1935 (R. 74). The evidence introduced consisted entirely of exhibits which, so far as material here, are as follows:

1. The record of a proceeding in the Supreme Court of New York in and for New York County, wherein, on August 11, 1926, the decedent was declared an incompetent (R. 77–95).

2. The record of a proceeding in the same court wherein, upon petition of the decedent's only living daughter, Mrs. MaBelle Houghton Plumb, dated October 8, 1926, the court, after a hearing before a referee appointed by it and upon his report, entered an order, on January 14, 1927, for an allowance to Mrs. Plumb out of the surplus income of the incompetent of $50,000 a year, as prayed for, and an equal amount to the general guardian of the three minor children of the incompetent's deceased daughter, Laura Houghton Harris; $3,000 per year to one of the incompetent's sisters, and $2,000 per year to each of the incompetent's three remaining sisters and a brother (R. 170–174).

3. The record of a proceeding in the same court wherein, upon the further petition of Mrs. Plumb, the court, after a hearing before another referee appointed by it, and upon his report, made a further order, on June 3, 1932, for additional allowances to Mrs. Plumb, out of the surplus income of the incompetent as prayed for, of $25,000 per year, payable in quarterly installments of $6,250 each, and in addition thereto the sum of $131,250, representing a payment of $25,000 per year for the then past five years, and also in addition $6,250, being the quarterly installment due March 31, 1932, of the additional allowance of $25,000 per year, and like allowances to the general guardian of the three minor sons of the decedent's deceased daughter; the order further

directing that certain securities of the incompetent be sold in order to raise sufficient cash out of which to make payment of the allowances ordered to be made (R. 285–293).

The evidence taken before the referee on the first petition for allowances disclosed that the decedent had made small annual allowances during various periods to her sisters and brother, and, as regards allowances made to her two daughters, that, after the marriage of her deceased daughter in 1912 she had given to each an annual allowance of $1,500, increasing this in 1913 to $3,000, and in 1914 to $6,000, which sum had been paid to each annually up to 1926. In addition, the decedent had given Mrs. Plumb $1,500 at the time of the birth of the latter's son and $5,000 in 1917. The decedent had also paid $30,000 for a house for Mrs. Plumb and in 1925 had made her a gift of $5,000, similar gifts having been made to the decedent's deceased daughter. (R. 112, 117, 119, 121, 129, 134, 135, 138, 144–145.) No evidence was adduced as to the financial condition of Mrs. Plumb or her husband, but the father and guardian of the three minor sons of the deceased daughter testified that his wife's estate was approximately $50,000, which included the value of the home the decedent had given her (R. 144). The evidence further disclosed that about the time the decedent was declared incompetent her accumulated income was $757,214.25, substantially all of which had been derived from her husband's

estate (R. 147), and that it required between $1,500 and $2,000 per month for her maintenance (R. 148). Furthermore, at this hearing Mrs. Plumb consented that any allowance made to her which exceeded that made to the guardian of her deceased sister's minor sons should, to the extent of the excess, be considered an advancement to her, to be charged as such against her share of the decedent's estate at the latter's death (R. 136–139).

The evidence was, however, devoid of any showing that the decedent would have made allowances to her living daughter and to the minor sons of her deceased daughter in excess of $6,000 per year had she remained competent. Nevertheless, upon the recommendation of the referee (R. 168–169), the court made an order granting the allowances as prayed for, based upon the following findings and conclusions (R. 171–172):

> ON READING AND FILING the testimony taken at said hearing and the report of the said Referee, and it appearing to my satisfaction that the income of the said incompetent for the last four or five years has averaged over Three Hundred Thousand Dollars, and that to maintain and support the incompetent, and to care for her property, there cannot reasonably be expended a greater sum than Fifty Thousand Dollars, and that the said Helen Hall Vail has not made a last will and testament and that the said MaBelle Houghton Plumb, the only surviving child of said incompetent, or her

> issue, and the said John H. Harris, William R. Harris and David F. Harris, the three children of a deceased daughter of said incompetent, or their issue, will be, upon the death of said incompetent, the only heirs-at-law and next-of-kin of said incompetent, and the only persons entitled to share in her estate, and this Court having found and hereby finding, upon the evidence submitted before said Referee and to this Court, that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property.

The evidence taken before the referee on the second petition disclosed that the decedent's accumulated surplus income was then $1,051,078.56 (R. 207), and that in addition there was property of the value of about $900,000 (R. 220); that her annual income from her husband's estate was $382,770.84 in 1931, exceeding that for 1930 of $378,016.09 (R. 258), and that in addition there was $77,412.78 income from her own estate (R. 211–212).

The only evidence as to the necessity for an increase in the allowance of $50,000 awarded to Mrs. Plumb in 1927 was that her son was about to go to college and that the allowance she was then receiving was not entirely sufficient to defray the expenses of sending him there (R. 227). As

regards the necessity of an additional allowance to the three minor sons of the decedent's deceased daughter, their father and guardian testified that his married life has been characterized by a good deal of luxury; that he had travelled abroad, conducted a large house with quite a number of servants, with all of which the incompetent had been familiar; that he had never been dependent upon her for support or financial aid (R. 241–242); that the three children lived with him, went to school, he paying their expenses and for other things required by way of their support and maintenance, and that all their moneys were invested in legal securities (R. 243). At the close of the testimony, the attorney for the petitioner, which was then acting as the committee of the decedent's property, stated, among other things, that to him the application was not a matter of obtaining an allowance; but rather the idea of distributing the incompetent's property in contemplation more or less of her death, and that he did not think the court, simply because a person was incompetent, had an inherent power to give away an incompetent's property (R. 261–262). Furthermore, the attorney for the guardian of the three minor boys stated that he did not pretend to the referee that the $50,000 annual allowance already made was not adequate for the support and maintenance of the three small boys. He said he thought that sum was adequate, and in addition, that their father was perfectly able to

take care of them and give them such education and physical comforts as they needed[1] (R. 262); that the only theory he could stand on in "this court" was the thought that the advancement was proper and should be made under the circumstances (R. 264).

There was no evidence adduced at this hearing that the incompetent, had she remained competent, would at any time have increased the allowances retroactively by $25,000, or by any other amount. Upon the referee's report recommending the increase in the allowances, the court made an order therefor based upon the following findings (R. 286–287):

> On reading the testimony taken at said Hearing from which it appears that there is accumulated income in the possession of the Committee of an inventoried value of $1,051,078.56, and whereas from the said testimony it appears that the income for the past five and one-half years has averaged about $395,000.00 a year, and the surplus income after paying all expenses, including allowances heretofore granted by the Order of January 14th, 1927, and paying all expenses, and etc. on account of the incompetent for her care and main-

[1] The court below had found that the father of these children had an annual gross income of $200,000 (R. 409). Presumably, there was adequate basis in the evidence presented to it for such a finding. In any event, the evidence upon which this finding is based was omitted from the record here presented (but see R. 66).

> tenance averaged about $191,105.18 a year, and it further appearing that said Helen Hall Vail is seventy-seven years of age and will not recover from the disease from which she is suffering and that her only issue is the petitioner, MaBelle Houghton Plumb and her son, Joseph H. Plumb, Jr., and the three infants, John H. Harris, William R. Harris and David F. Harris, children of a deceased daughter of the incompetent, and that said Helen Hall Vail has not made her Last Will and Testament, and that upon the death of the said incompetent the only persons entitled to share in her estate will be the said MaBelle Houghton Plumb the only surviving child of said incompetent and her son, Joseph H. Plumb, Jr., and the said John H. Harris, William R. Harris and David F. Harris the three children of a deceased daughter of said incompetent, or their issue * * *.

From these findings, the court concluded (R. 287)—

> that if the said incompetent, Helen Hall Vail, were in possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowances to such persons out of her property. * * *.

The payments made under these orders, aggregating $1,377,866.67, were included by the Com-

missioner in the decedent's gross estate, resulting in a deficiency determination in estate taxes of $653,812.29 (R. 376–380), which was paid.

The District Court, after making findings regarding the facts presented to the Supreme Court of New York, substantially similar to those made by that court, made the following findings concerning the nature of the proceedings in that court and of the orders made by it therein (R. 409–411):

> XXI
>
> Neither the petition of 1926 nor that of 1932 show, nor was any proof offered in support thereof to show the need of any allowance to any of the direct or collateral heirs. The petition of 1932 shows no need of any allowance to any of the direct heirs and does not mention the collateral heirs.
>
> XXII
>
> The Referee in the 1926 proceeding recommended an allowance of $50,000 to the General Guardian of the Harris children to be applied by him to their "maintenance and support." During this period the father of these children had an annual gross income of $200,000.
>
> XXIII
>
> The records of the proceedings in 1926 and 1932, specifies the intent and purpose to equalize allowances to direct heirs so that

each would share equally in the estate of the incompetent upon her death.

XXIV

The increase in the allowance in 1932 was a gift made in anticipation of succession to the estate by MaBell Houghton Plumb and the children of Laura Houghton Harris the only direct heirs of the incompetent.

XXV

The making of the retroactive allowances aggregating $250,000 was a means of distributing part of the incompetent's estate in anticipation of her death.

XXVI

A substantial part of this estate was withdrawn by these allowances. The amount, as heretofore stated, was $1,377,866.67.

XXVII

In the proceedings by which the allowances were made to MaBelle Houghton Plumb and others by the Supreme Court of the State of New York, New York County, Mrs. Plumb stipulated that the ultimate amount she should receive from the estate of the incompetent on the death of the incompetent should not exceed that to be paid the General Guardian on account of the Harris children; and these allowances were characterized in the stipulations as "advancements."

XXVIII

All sums of money paid to MaBelle Houghton Plumb and Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, Helen Hall Vail, and to Edward Hegeman Hall, Mary Hall Taft, Elizabeth Hall Burdick, Abbe Ferrin and Lucy Hall Ferris, by the Committee of the property of Helen Hall Vail, pursuant to the order entered by Honorable Richard P. Lydon, Justice of the Supreme Court of the State of New York, on January 14, 1927, and pursuant to the order entered by Hon. Phoenix Ingraham, Justice of the Supreme Court of the State of New York, on June 3, 1932, were motivated by the same considerations that lead to, and were intended as, testamentary dispositions of the property and the estate of the incompetent and were transfers made in contemplation of death and in anticipation of the succession to the estate of said incompetent, save and except the sum of $6,000 paid annually to MaBelle Houghton Plumb and Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and except the sum of $500 paid annually to Lucy Hall Ferris.[2]

---

[2] These sums were excepted by the district court since the decedent had made similar annual gifts before becoming incompetent (see Statement, *supra*, p. 4) and hence such gifts "were motivated by the same motive which would have lead the incompetent, Helen Hall Vail, to make payments in these amounts to these respective parties" (R. 399).

From the findings thus made, the District Court concluded that the allowances were "made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932, now Section 811 (c) of the Internal Revenue Code" (R. 411), and that, upon the facts and evidence the respondent was entitled to judgment dismissing the petitioner's complaint except that the parties had stipulated and agreed that the petitioner was entitled to judgment under the decision of the District Court (after credit for payment of additional state inheritance taxes to the States of New York and Florida, respectively) in the sum of $54,100.24, with interest (R. 416–417). The court below affirmed this judgment (R. 444–445), Judge Swan dissenting (R. 442–444).

ARGUMENT

1. The court below stated that the property of the decedent was "transferred" by the orders of the New York Supreme Court, on the ground that New York law gave the judges of the state court the necessary power (R. 438–440). Hence, it said that the question before it, whether the property of the decedent was transferred by the orders of the New York court in contemplation of her death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended (Appendix, *infra*, pp. 20–21), resolved itself into two parts. The first, which is the principal question in the case, is whether Section 302 (c) covered the pay-

ments here, in case they were made in contemplation of death, and the second is whether they were made in such contemplation. (R. 437–438) The court below considered these questions in the order stated, assuming for the purpose of its discussion of the first that the transfers were made in contemplation of the decedent's death. After deciding that the New York Supreme Court's action in making the transfers was attributable to the decedent, the court held that the transfers were made in contemplation of her death and were accordingly includible in her gross estate.

(a) We submit that petitioner's assertion (Pet. 12) that the decision of the court below, insofar as it imputed the making of the transfers here in question, together with their incidents, to the decedent, is in probable conflict with *United States* v. *Wells*, 283 U. S. 102, is without merit. The transfers under consideration in the *Wells* case were made by the decedent himself, who was competent, and the only question before the Court was whether Congress had intended to restrict the application of the statute to transfers made in fear or expectation of imminent death. This Court rejected the interpretation of the Court of Claims that a transfer was includible in the decedent's gross estate only where it was immediately and directly prompted by an expectation of death, because such an interpretation would defeat the dominant purpose of Congress to reach substitu-

tion for testamentary disposition and thus prevent the evasion of the estate tax. The Court said (283 U. S. at p. 117) that, as a transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. "Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition" (*ibid.*). Nothing in the *Wells* case justifies a conclusion that the Court either in substance or effect condemned the attribution to an incompetent of a gift made for her by a duly constituted agent in contemplation of her death. In fact, in another connection, the petitioner states (Pet. 15), "The research of counsel has discovered no cases similar to that at bar."

(b) There is no proper basis for petitioner's assertion (Pet. 13) that the statute does not cover the transfers here in question, because it contemplates a transfer by the decedent personally and the contemplation of death must be that of the decedent personally.

Certainly it could not be successfully contended that if the decedent had herself given a power of attorney to another to deal with her property, a transfer made by such attorney, because of the imminence of the decedent's death and in order to avoid the tax, would not have been made in contemplation of her death within the meaning of the statute. Here, since the decedent was incompetent, the law of New York constituted its courts

the agent of the incompetent, placing the custody of her property in their hands with power to administer it, including the power to make certain allowances to her family. Section 1357 of the New York Civil Practice Act; see also the authorities cited by the District Court (R. 392). Manifestly, whatever disposition the courts were empowered by the law of New York to make of the incompetent's property was made in her name and for her use and benefit. Hence there can be no question, we think, that the transfers here were gifts attributable to the incompetent, so that they attracted the gift tax for which she became personally liable. The court below so held as to those of the transfers here in question which were made subsequent to the disposition of the 1932 gift tax (*City Bank Farmers Trust Co.* v. *Hoey*, 101 F. 2d 9), and the Circuit Court of Appeals for the Ninth Circuit has subjected similar transfers to the gift tax. *Commissioner* v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641. If a gift made by a court for an incompetent is attributable to her, there would appear to be no sound reason for saying that the purpose for which it is made is not likewise attributable to her.

For these reasons, it is submitted that the construction placed upon the statute does no violence to the Congressional intent. On the contrary, it is a rational construction and furthers the dominant purpose of Congress to prevent evasion of the

tax. *United States* v. *Wells*, 283 U. S. 102, 117; *Milliken* v. *United States*, 283 U. S. 15, 20; *Nichols* v. *Coolidge*, 274 U. S. 531, 542.

2. Petitioner's contention (Pet. 7–11) that the decision of the court below is in conflict with applicable local decisions dealing with the power of the New York court to distribute portions of the incompetent's estate is irrelevant. The petitioner does not challenge the Second Circuit's definition of the statutory phrase "contemplation of death," and we submit it could not successfully do so. Its contention is that the New York court had no power under local law to make a transfer of any portion of an incompetent's property and has not expressly stated that it did, and that consequently it must be presumed conclusively, even contrary to the fact, that it did not do so. However, since the incompetent's property was actually transferred, the only question is whether the transfers made are of the sort that fall within the purview of the federal statute. Contrary to petitioner's views (Pet. 11), it was therefore not necessary that a finding should be made in this proceeding that the New York court exceeded its jurisdiction or abused its discretion in granting the allowances.

The question as to what the New York judges actually meant to do when making the allowances is a question of fact. Both the District Court and the court below have found that, insofar as the allowances exceeded those which the decedent had

actually made prior to incompetency, they were meant to be advancements to the decedent's heirs on account of the property which they would receive at her death and as a result thereof. The District Court found (R. 409–410) that the records in the allowance proceedings in 1926 and 1932 specified the intent and purpose of the New York judges, acting for the incompetent, to equalize the allowances to the direct heirs so that each would share equally in the estate of the incompetent upon her death and that the increases in the allowances in 1932 were gifts made in anticipation of succession to the estate by the decedent's living daughter and the children of her deceased daughter, who were her only direct heirs; that the making of the retroactive allowances aggregating $250,000 was a means of distributing a part of the incompetent's estate in anticipation of her death, and that as a result a substantial part thereof, namely, $1,377,866.67, was withdrawn therefrom by these allowances.

The court below obviously accepted this finding; and, since the allowances, so far as they exceeded $6,000 per year to the decedent's living daughter and a like amount to the minor boys of her deceased daughter (see Statement, *supra*, p. 4), actually constituted advancements to them on account of what they would receive of the decedent's property as her heirs at her death, it undertook to rationalize (R. 438) the finding of the New York court that the decedent would have made the

gifts, upon the only possible basis that such finding could be rationalized (*viz.*, that the decedent would have made the gifts if she were competent and foresaw her future incompetency). The taxpayer has failed to suggest any other.

CONCLUSION

We believe that the circuit court of appeals correctly construed and applied the federal statute. While the question presented is novel, the decision is confined to the peculiar facts presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) [as amended by Sec. 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or

money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

New York Civil Practice Act (Cahill, Seventh Edition):

SEC. 1356. *Jurisdiction of supreme court; concurrent jurisdiction of county court.* The jurisdiction of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article. (Code Sec. 2320, in part.)

SEC. 1357. *Duty of court having jurisdiction.* The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family. (Code. Sec. 2321.)

SEC. 1383. *Death of incompetent; duty of committee.* Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, shall render to the court by which he was appointed a final account of his proceedings touching the property of the incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. (As amended by L. 1935, ch. 724, September 1. Code Sec. 2344, in part.)

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No. 294

In the Supreme Court of the United States

OCTOBER TERM, 1944

CITY BANK FARMERS TRUST COMPANY, FORMERLY KNOWN AS THE FARMERS LOAN AND TRUST COMPANY, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HELEN HALL VAIL, DECEASED, PETITIONER

v.

GEORGE T. McGOWAN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-EIGHTH COLLECTION DISTRICT, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 387–400) is reported in 43 F. Supp. 790, and the opinion of the Circuit Court of Appeals for the Second Circuit (R. 436–444) is reported in 142 F. 2d 599.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1944 (R. 444–445). The petition for a writ of certiorari was filed on July 27, 1944, and was granted on October 9, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain allowances made to the decedent's daughters and others in the decedent's lifetime out of her estate pursuant to orders of the Supreme Court of New York, the decedent having been adjudged an incompetent, are includible in her gross estate under the "contemplation of death" provision of Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*.

STATEMENT

This is a suit against the Collector of Internal Revenue for the recovery of federal estate taxes paid by the City Bank Farmers Trust Company, as administrator of the estate of Helen Hall Vail (R. 2–12), who died on December 27, 1935 (R. 74). The evidence introduced consisted entirely of ex-

hibits which, so far as material here, are as follows:

1. The record of a proceeding in the Supreme Court of New York in and for New York County, wherein, on August 11, 1926, the decedent was declared an incompetent (R. 77–95).

2. The record of a proceeding in the same court wherein, upon petition of the decedent's only living daughter, Mrs. MaBelle Houghton Plumb, dated October 8, 1926, the court, after a hearing before a referee appointed by it and upon his report, on January 14, 1927, entered an order, as prayed for, for an annual allowance of $50,000 to Mrs. Plumb out of the surplus income of the incompetent, an equal annual amount to the general guardian of the three minor children of the incompetent's deceased daughter, Laura Houghton Harris, $3,000 per year to one of the incompetent's sisters, and $2,000 per year to each of the incompetent's three remaining sisters and a brother (R. 170–174).

3. The record of a proceeding in the same court wherein, upon the further petition of Mrs. Plumb, the court, after a hearing before another referee appointed by it, and upon his report, made a further order on June 3, 1932, for additional allowances to Mrs. Plumb out of the surplus income of the incompetent, as prayed for, of $25,000 per year, payable in quarterly installments of $6,250 each, and in addition thereto the sum of $131,250, representing a payment of $25,000 per year for

the then past five years and $6,250 as the quarterly installment due March 31, 1932, of the additional allowance of $25,000 per year, and like allowances to the general guardian of the three minor sons of the decedent's deceased daughter; the order further directing that certain securities of the incompetent be sold to raise sufficient cash out of which to make payment of the allowances so ordered (R. 285–293).

The evidence taken before the referee on the first petition for allowances disclosed that the decedent had made small periodic gifts at various times to her sisters and brother, and that after the marriage of her deceased daughter in 1912 she had given to each of her two daughters an annual allowance of $1,500, increasing this in 1913 to $3,000, and in 1914 to $6,000, which sum had been paid to each annually up to 1926. In addition, the decedent had given Mrs. Plumb $1,500 at the time of the birth of the latter's son and $5,000 in 1917. The decedent had also paid $30,000 for a house for Mrs. Plumb and in 1925 she made her a gift of $5,000, making similar gifts to the decedent's deceased daughter. (R. 112, 117, 119, 121, 129, 134, 135, 138, 144–145.) No evidence was adduced as to the financial condition of Mrs. Plumb or her husband, but the father and guardian of the three minor sons of the deceased daughter testified that the appraised value of his wife's estate at her death was approximately

$50,000, which included the value of the home the decedent had given her (R. 144). The evidence further disclosed that about the time the decedent was declared incompetent her accumulated income was $757,214.25, substantially all of which had been derived from her husband's estate (R. 147), and that it required between $1,500 and $2,000 per month for her maintenance (R. 148). Furthermore, at this hearing Mrs. Plumb consented that any allowance made to her which exceeded that made to the guardian of her deceased sister's minor sons should, to the extent of the excess, be considered an advancement to her, to be charged as such against her share of the decedent's estate at the latter's death (R. 136–139).

Upon the recommendation of the referee (R. 168–169), the court made an order granting the allowances as prayed for, based upon the following findings and conclusions (R. 171–172):

> ON READING AND FILING the testimony taken at said hearing and the report of the said Referee, and it appearing to my satisfaction that the income of the said incompetent for the last four or five years has averaged over Three Hundred Thousand Dollars, and that to maintain and support the incompetent, and to care for her property, there cannot reasonably be expended a greater sum than Fifty Thousand Dollars, and that the said Helen Hall Vail has not made a last will and testament and that the said MaBelle Houghton Plumb, the

> only surviving child of said incompetent, or her issue, and the said John H. Harris, William R. Harris and David F. Harris, the three children of a deceased daughter of said incompetent, or their issue, will be, upon the death of said incompetent, the only heirs-at-law and next-of-kin of said incompetent, and the only persons entitled to share in her estate, and this Court having found and hereby finding, upon the evidence submitted before said Referee and to this Court, that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property.

The evidence taken before the referee on the second petition disclosed that the decedent's accumulated surplus income was then $1,051,078.56 (R. 207), invested in securities with a current market value of about $900,000 (R. 220); that her annual income from her husband's estate was $382,770.84 in 1931, exceeding that for 1930 of $378,016.09 (R. 258); and that in addition there was $77,412.78 income from her own estate (R. 211–212).

The only evidence as to the necessity for an increase in the allowance of $50,000 awarded to Mrs. Plumb in 1927 was that her living expenses were increasing due to the age of her son and the

fact that he was about to go to college (R. 227). As regards the necessity of an additional allowance to the three minor sons of the decedent's deceased daughter, their father and guardian testified that his married life has been characterized by a good deal of luxury; that he had travelled abroad, conducted a large house with quite a number of servants, with all of which the incompetent had been familiar; that he had never been dependent upon her for support or financial aid (R. 241–242); that the three children lived with him, and went to school, he paying their expenses and paying for other things required for their support and maintenance; and that all their moneys were invested in legal securities (R. 243). At the close of the testimony, the attorney for the petitioner, which was then acting as the committee for the decedent's property, stated, among other things, that to him the application was "not a matter of obtaining an allowance," but rather "the idea of distributing part of this incompetent's property in anticipation more or less of her death," and that he did not think the court "simply because a person is incompetent has any inherent power to give away a person's property" (R. 261–262). Furthermore, the attorney for the guardian of the three minor boys stated that he did not pretend to the referee that the $50,000 annual allowance already made was not adequate for the support and main-

tenance of the three small boys. That sum, he thought, was adequate, and he added that their father was perfectly able to take care of them and give them such education and physical comforts as they needed[1] (R. 262). He justified the allowance on the ground that the children's grandfather would wish them to have the income and that the incompetent, "if she were in sound mind would want to carry out her husband's wishes" (R. 264). He concluded: "The only theory I can stand on in this court is, I think, that the advancement is proper, and should be made under the circumstances" (Ibid.).

Upon the referee's report recommending the increase in the allowances, the court made an order therefor based upon the following findings (R. 286–287):

> ON READING the testimony taken at said Hearing from which it appears that there is accumulated income in the possession of the Committee of an inventoried value of $1,051,078.56, and whereas from the said testimony it appears that the income for the past five and one-half years has averaged about $395,000.00 a year, and the surplus income after paying all expenses, including allowances heretofore granted by the Order of January 14th, 1927, and paying all expenses, and etc. on account of the incompetent for her care and

[1] The District Court found that the father of these children had an annual gross income of $200,000 (R. 409; cf. R. 66, 67).

maintenance averaged about $191,105.18 a year, and it further appearing that said Helen Hall Vail is seventy-seven years of age and will not recover from the disease from which she is suffering and that her only issue is the petitioner, MaBelle Houghton Plumb and her son, Joseph H. Plumb, Jr., and the three infants, John H. Harris, William R. Harris and David F. Harris, children of a deceased daughter of the incompetent, and that said Helen Hall Vail has not made her Last Will and Testament, and that upon the death of the said incompetent the only persons entitled to share in her estate will be the said MaBelle Houghton Plumb the only surviving child of said incompetent and her son, Joseph H. Plumb, Jr., and the said John H. Harris, William R. Harris and David F. Harris the three children of a deceased daughter of said incompetent, or their issue * * *.

From these findings, the court concluded (R. 287)—

> that if the said incompetent, Helen Hall Vail, were in possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowances to such persons out of her property, * * *.

The payments made under these orders, aggregating $1,377,866.67, were included by the Com-

missioner in the decedent's gross estate, resulting in a deficiency determination in estate taxes of $653,812.29 (R. 376–380), which was paid.

The District Court made findings regarding the facts presented to the Supreme Court of New York substantially similar to those made by that court, as well as findings concerning the nature of the proceedings in that court and of the orders made by it therein (R. 409–411). From the findings thus made, the District Court concluded that the allowances were "made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932, now Section 811 (c) of the Internal Revenue Code" (R. 411),[2] and that upon the facts and evidence the respondent was entitled to judgment dismissing the petitioner's complaint, except that the parties had stipulated and agreed that the petitioner was entitled to judgment under the decision of the District Court (after credit for payment of additional state inheritance taxes to the States of New

[2] The District Court excepted "the sum of $6,000 paid annually to MaBelle Houghton Plumb and Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and * * * the sum of $500 paid annually to Lucy Hall Ferris", on the ground that the decedent had made similar annual gifts before becoming incompetent (see Statement, *supra*, p. 4) and hence such gifts "were motivated by the same motive which would have led the incompetent, Helen Hall Vail, to make payments in these amounts to these respective parties" (R. 399).

York and Florida, respectively) in the sum of $54,100.24, with interest (R. 416–417). The court below affirmed this judgment (R. 436–441, 444–445), Judge Swan dissenting (R. 442–444).

SUMMARY OF ARGUMENT

1. Under the law of the State of New York, the state court had no power to dispose of the incompetent's property as though she were dead; it could make only such transfers as it found she would have made if competent. In making such transfers it could not follow purposes of its own, or objectives which it deemed desirable, but was obliged to observe such considerations, moral or charitable or otherwise, as it found would have motivated her if competent. When such transfers are made by state courts, both the transfers and the motivating purpose are attributed to the incompetent.

2. Because the state court could transfer the incompetent's property only for such purposes as it found would have motivated her if competent, it was without power to effect a testamentary disposition of her property as such, and it did not do so. On the other hand, the state law does not forbid the making of allowances merely because the purpose motivating them, which the court attributed to the incompetent, would bring the transfers within the purview of the federal taxing statute. Accordingly, the state court was not prohibited by state law from making what under the federal statute

would be regarded as a substitute for a testamentary disposition, provided only that it could attribute a purpose to make such disposition to the incompetent. To do this was not to make a testamentary disposition. We know of no authority which sanctions any distinction between the types of motives which a state court may properly find would have actuated an incompetent in disposing of her property.

In any event, the orders of the state court are final, binding orders which have not been appealed nor attacked collaterally. No issue as to the scope of the state court's power is therefore now open; the sole question is whether the motive which in fact the state court attributed to the incompetent was of such a nature as to bring the transfers within the ambit of the federal estate tax.

3. In this case the records before the state court in the proceedings which led to the allowances in question supported the conclusion that the incompetent, if competent, would have desired to make a substitute for a testamentary disposition; and that was in fact the only motive attributed by the state court to her as a basis for the transfers.

4. Transfers thus made are transfers made "in contemplation of death" within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended. The purpose of the statute is to assimilate *inter vivos* gifts to testamentary dispositions whenever they are motivated by a purpose to anti-

cipate the devolution of the donor's property at his death. In this case the Commissioner concluded that the transfers were made "in contemplation of death" within the meaning of the statute; and the presumption of correctness which attaches to his determination placed upon the petitioner the burden of establishing that a positive life motive actuated the transfers, and that "contemplation of death" formed no substantial part of the motivating purpose. Here, not only did the petitioner fail to sustain this burden; the records in the proceedings in the state court, as well as the orders of that court, make clear that the only substantial purpose of the transfers was a purpose to anticipate the disposition of the incompetent's property which would have occurred on her death if she had died intestate.

5. The transfers made by the state court were transfers made by the decedent within the meaning of Section 302 (c). The contrary argument advanced by the petitioner rests upon a demand for a strictly literal construction of the statute, a construction which is not only unnecessary but inconsistent with the manifest intention of Congress. This Court has in previous cases recognized the need for flexibility in the construction and administration of the federal estate tax law, in order to prevent evasion of the tax, and should here accept as within the operation of the statute transfers which under state law were properly made by a state

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court on the incompetent's behalf, and for her own purposes, in contemplation of her death.

ARGUMENT

THE TRANSFERS WERE MADE BY THE DECEDENT IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF SECTION 302 (C) OF THE REVENUE ACT OF 1926, AS AMENDED

The focal point of the petitioner's argument seems to be (cf. Br. 25) that, since the state court would have been without power to make a testamentary disposition of the incompetent's property, the position of the Government must amount to a contention that the orders of the state court by which the incompetent's property was transferred were beyond the court's jurisdiction. We make no such contention, either explicitly or implicitly; on the contrary, the Commissioner's determination was based on the assumption of the validity of the state court's orders, and the Government has not challenged their validity in either of the courts below and does not challenge them here. In the interest of clarity, we summarize at the outset the contentions upon which the Government's position rests. They are

(1) That the law of the State of New York attributed both the transfers and their motivating purpose to the incompetent, and authorized the state court to transfer the incompetent's property only for such purposes as it found would have motivated her if she had been competent;

(2) That although the state court would have had no authority to make a testamentary disposition, as such, of the incompetent's property, it was fully authorized to make a substitute for a testamentary disposition upon a finding that she would, if competent, herself have done so; and that in any event, since the orders of the state court are final, binding orders which have not been appealed or subjected to collateral attack, the question for consideration is not what the state court could properly have done, but what in fact it did do.

(3) That in fact the purpose attributed by the state court to the incompetent as the sole basis for the transfers was a purpose to make a substitute for a testamentary disposition;

(4) That transfers so motivated are transfers made "in contemplation of death" within the meaning of Section 302 (c);

(5) That transfers of an incompetent's property thus made by a state court are transfers made by the decedent within the meaning of the Section.

1. The law of the State of New York attributed both the transfers and their motivating purpose to the incompetent, and the state court was authorized to make the transfers only for such purposes as it found would have motivated the incompetent herself if she had been competent

There is nothing whatever in the law of the State of New York which empowers its courts to

make a transfer of an incompetent's property of their own volition, or to subserve a purpose of their own or any other purpose than they find the incompetent would wish to subserve if he were competent. State courts do not have the power to dispose of a living incompetent's property as though he were dead (*Griffiths* v. *Frazier*, 8 Cranch 9, 23; *Scott* v. *McNeal*, 154 U. S. 34, 48–49; *Hamilton* v. *Brown*, 161 U. S. 256, 267–268); and it is well settled in New York that for a state court to do more than it found the incompetent would have done, if competent, in respect of his property, would be assuming power, in effect, to make a will for him and to dictate its terms—a power which remains in him and in him alone or else is suspended or entirely extinguished. *Lewis* v. *Jones*, 50 Barb. 645, 649–650. In that case the court further pointed out (pp. 662–663) that there was nothing in the objectives of the court's authority over the estate "to sanction the idea, that either the court or the committee have anything to do with its distribution after his death."

Thus, as indicated by the petitioner (Br. 22), the Court of Appeals of New York in *Matter of Flagler*, 248 N. Y. 415, said (p. 418):

> The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incom-

> petent. In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them.

The power of the courts of New York to make gratuitous transfers of the incompetent's property is thus limited to the kind of transfers which they may find the incompetent would make if competent, and which spring from whatever moral or charitable considerations would dictate her decisions if she were competent, giving force and effect thereto only to the extent that she, and not the court, might feel their force. The state court is without power to regard the intent of the next of kin, or to make transfers to them independently of considerations that it finds would have dictated the incompetent's decision if she had been competent. As Lord Eldon said in *Ex parte Whitbread*, 2 Mer. 99, 102, such transfers may not be made merely because "if a Lunatic were to die to-morrow, they [the donees] would be entitled to the entire distribution of his estate"; if they are to be made, it must be "because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

Clearly, the New York law attributes both the transfers and their motivating purposes to the incompetent; and in the light of the historic functions and limitations of the courts in such cases

(cf. the Statute of 17 Edw. II, cited in petitioner's brief, p. 17, n. 2) no other course would, we submit, be possible.

2. The state court was not without power to make transfers which the decedent would have made, if competent, merely because their character was such as to bring them within the ambit of the federal estate tax statute

Though the state court would have been without power to transfer property of the incompetent to those who, if she should then die, would be her heirs at law, merely because in its judgment it was desirable to anticipate the transfer which would ultimately occur at her death, it by no means follows that the court could not make a transfer which, because of the nature of the motivating factor therefor which it attributed to the incompetent, would attract the federal estate tax. As we show in detail below, the record establishes that the latter was the course adopted by the state court in this case, and we believe that this course was an entirely proper one. The state court was empowered to make the transfers, from whatever motive they might have sprung, provided only that it could and did find from the records before it that the incompetent, if competent, would have been motivated by such purposes. If the incompetent would have made transfers "in contemplation of her death," within the meaning of the federal statute, it was not beyond the power of the state court to

make them on her behalf, and this power was not in the least impaired by the prohibition to make a testamentary disposition as such. As a matter of fact, the petitioner makes no distinct contention that the transfers were *per se* beyond the state court's power merely because they were of a sort which would subject them to the federal estate tax.[1]

In illustration, let us assume that, instead of increasing from $6,000 to $75,000 the annual allowances which the decedent had made to her daughters, and after the death of her daughter Laura to the latter's three boys, the court had been faced with the fact that the decedent had herself while still competent increased the allowances to $75,000, or even more, leaving herself only enough to satisfy her own requirements, and that she had done so because she was in ill health, feared that she might die at any time, and wanted besides to avoid the death tax. Could it be argued that when thereafter she became incompetent the court was powerless to accept these considerations and continue the allowances, and that it was powerless to do so merely because a purpose to make a sub-

[1] Incidentally, it is not arguable that the allowances here in question, to the extent that they were paid after the enactment of the federal gift tax statute of 1932, were not subject to the federal gift tax. In any event, they have been held to be subject thereto. *City Bank Farmers Trust Co.* v. *Hoey*, 101 F. 2d 9 (C. C. A. 2d). See also *Commissioner* v. *Greene*, 119 F. 2d 383 (C. C. A. 9th), certiorari denied, 314 U. S. 641. The petitioner does not now question the correctness of these decisions.

stitute for a testamentary disposition was not the kind of purpose which could be attributed to an incompetent, or because to do so would, perchance, attract the federal estate tax thereto? We know of no case which so distinguishes between motives, or which rests the power of the court upon the nature of the particular motive which it attributes to the incompetent. Such distinctions would vitiate the established doctrine that the power of the court turns upon no other considerations than what, in the court's judgment, the incompetent would do if competent.

Moreover, the state court clearly possessed jurisdiction of the subject matter and of the parties, and since no appeal was taken from its orders, they became final and unassailable. Even if they had been so far beyond the court's power as to be subject to collateral attack, none has been made, and none is made here. Consequently, extended argument as to the scope of the state court's power tends to obscure the basic issue before the Court, which is, not what the state court was authorized to do, but what in fact it did do. At best, the question whether what the state court did was within its power to do would be relevant only to resolve doubt as to what it did—doubt as to what purpose it in fact attributed to the incompetent. Here, as we shall presently undertake to show, there is no such doubt; the orders of the state court and the records on which they were based are consistent only with the conclusion that it attributed to the incompetent

a purpose to make a substitute for a testamentary disposition. Even if that purpose were less clearly demonstrated, its existence, being a purely factual question, should now be taken as established by the findings of the District Court, and the concurrence of the court below therein.

3. The state court attributed to the incompetent a purpose to make a substitute for a testamentary disposition as the sole basis for the transfers made by each order

The relevant principle is, of course, more strikingly illustrated by the example which we have given (*supra*, pp. 19–20) than by the situation in the case at bar. Nevertheless, the motive which the state court attributed to the incompetent is vividly outlined by the facts. Aside from a few casual gifts made on special occasions to her daughters—gifts which, considering her annual income, were surprisingly small—the incompetent had herself given to each an annual allowance of only $6,000. That was the amount of the allowance which she had made annually to each since 1914—that is, for the last 12 years of her competency—without increasing it by so much as a single dollar.[1] Yet in increasing the allowances from $6,000 to $50,000 by the first order made in 1927, and from $50,000 to $75,000 by the second order made in 1932, payable

[1] The allowances, originated at $1,500 in 1912, had been increased to $3,000 in 1913, and to $6,000 in 1914.

retroactively to 1927, the state court found that, if the incompetent were in possession of her mental faculties and in all respects competent, she would desire that the increases be made. The payments thus made to the decedent's living daughter and to the three minor children of her deceased daughter aggregated approximately $1,200,000, as against a total of about $76,000 which they would have received had their allowances been continued at the rate of $6,000 per annum. But the records in the allowance proceedings will be searched in vain for any justification for the increases other than that, assuming the decedent to be competent, she would be motivated in making the transfers by a purpose to substitute them for the distribution of her property which would occur at her death and as the result thereof. This was, in fact, the sole basis of the state court's orders increasing the allowances to the decedent's daughter and grandchildren.[5]

Thus, as a basis of the first order, the state court found that less than $50,000 was required for the maintenance of the incompetent and her property; that she had not made a last will and testament; that her living daughter, the only surviving child of the incompetent, or her issue, and the three minor children of her deceased daughter, or their issue, would upon her death be her only heirs at

[5] The basis for including in the decedent's gross estate the allowances made by the first order to the decedent's brother and sisters will be later discussed. See pp. 35–37, *infra*.

law and next of kin and the only persons entitled to share in her estate (R. 171–172). And, as a basis of the second order, the state court found that after the payment of all of the expenses on account of the incompetent's care and maintenance there remained a surplus of about $191,105.18 of her annual income; that she was then 77 years of age and would not recover from the disease from which she was suffering; that her only issue was her living daughter and the latter's son, and the three infant children of the deceased daughter; and that, since she had made no will, these persons, or their issue, would be the only persons entitled to share in her estate upon her death (R. 286–287). By contrast, there is no finding that her living daughter or grandchildren needed the increased allowances.

In this state of the record the District Court found as a fact that the gifts "were motivated by the same considerations that lead to, and were intended as, testamentary dispositions of the property and the estate of the incompetent and were transfers made in contemplation of death and in anticipation of the succession to the estate of [the] incompetent, save and except the sum of $6,000 paid annually to" her living daughter and to the guardian of the children of her deceased daughter, and except $500 paid annually to one of her sisters (R. 411).

This finding, we submit, is sustained not only by the findings of the state court in the allowance

proceedings, but as well by the records therein upon which the findings were based; and, as we have said, the court below concurred therein. The record in each proceeding in the state court is replete with uncontroverted testimony that the incompetent was incurably insane with no possible hope of recovery; that she needed for her maintenance relatively little of her annual income of $300,000 which she derived as the beneficiary under her first husband's will; that the living daughter and her son and the three minor sons of the deceased daughter and their issue were her only heirs at law and distributees and would get all of her property in any event under the laws of intestacy; and in this connection that no will had been found so that no one could possibly be prejudiced by the allowances. The record in the first state court proceeding demonstrates beyond question that the first allowance was regarded by all concerned as an advance on what the living daughter and the minor children of the deceased daughter would receive at the decedent's death (R. 138–139, 159; Referee's report, R. 164–168, 169; Order, R. 172–174). The living daughter and the guardian of the three minor children approached the court with the primary idea of "getting now" what they would "eventually get in the end." The attorney for the daughter, the petitioner in both state court proceedings, made

this clear in submitting the first petition. He said (R. 159):

> If Mrs. Vail were competent she would undoubtedly give them each a large allowance as she did while she was competent and up to within a year ago. In addition to that, Mrs. Vail's heirs-at-law, that is, her only surviving child and the guardian of the three grandsons who take the place of her deceased daughter, are perfectly willing that the allowances requested should be granted to the sisters and the brother of Mrs. Vail. Mrs. Plumb and these three grandchildren will divide between them upon Mrs. Vail's death, the whole of this estate so that the allowances cannot affect any person not interested in the estate. They are the remaindermen and they will get the whole estate divided among them upon Mrs. Vail's death.
>
> Mrs. Plumb gets the income during her life from one-half of the estate so that the granting of these allowances will only affect the persons who are applying for them and they will eventually get the property upon Mrs. Vail's death. The accumulated income here amounting to about $800,000., upon Mrs. Vail's death will be divided between Mrs. Plumb and the three grand-children.
>
> The trust fund created by the estate of Mr. Houghton will be divided in two upon Mrs. Vail's death and Mrs. Plumb will receive the income from one-half and the

> balance will be divided equally among the surviving children of Mrs. Harris, *so that by granting these allowances the child and grandchildren will be simply getting now what they will eventually get in the end,* with the exception of the small annual allowances asked for for the brother and sisters of Mrs. Vail, which they, the only persons interested in the estate are willing these sisters and brother should have. [Italics supplied.]

And the attorney for the guardian of the boys said (R. 160):

> On behalf of the General Guardian, I think his duty in the premises is to submit the interest of the children to the court for such disposition as the court may make, and as you will probably observe, it was the purport of the stipulation which was read into the record and acquiesced in, to establish an equality as between the petitioner and the children of Laura Houghton Harris, as evinced by the conduct of Mrs. Vail during her competency.

The situation is even more striking with regard to the retroactively increased annual allowances of $75,000 made on the second petition. The only justification suggested for making these on the basis of the present need of the beneficiaries was that the living daughter's son, aged 19, was about to enter college and that the allowance theretofore made to her was not sufficient to take care of the increase in maintenance expenses occasioned

thereby (R. 227). But the suggestion that such need justified the increased allowance was obviously irrelevant to the retroactive phase of the increase; it does not appear to have been taken seriously by the parties, and was in fact ignored by the state court. The attorney for the City Bank Farmers Trust Company (the petitioner here in its present capacity as administrator of the decedent's estate, but then acting as the committee of the incompetent's property) stated at the same hearing before the referee that to him the application was "not a matter of obtaining an allowance," but rather "the idea of distributing part of this incompetent's property in anticipation more or less of her death" (R. 261). In reply, the attorney for the guardian of the boys stated that he did not pretend to the referee that the annual allowances already made were not adequate for their support and maintenance (R. 262). He submitted the rights of the boys to the protection of the court, subject only to the "insistence that any allowances that are made should be measured by the equality of treatment as between the petitioner and the infant wards" (R. 269)—an insistence of course unrelated to any theory of allowances based upon need. Further replying to the objection of the committee (R. 269), the attorney for the living daughter said that, in his opinion, it was not necessary to show an actual need for the extra allowances of $25,000 per annum or for the making of the

allowances retroactive for five years. He insisted that the court had ample authority to grant the allowances if it found from the record that the probabilities were that the incompetent would grant them if competent.

The petitioner asserts (Br. 35) that remarks of counsel such as those quoted above "could not be imputed to any court in determining its motive or reason for making an order." We do not of course impute the intent of counsel to the state court; but, in determining the considerations which moved the court to enter its orders, we may with propriety examine not only the orders themselves, but the entire records upon which they were based, including the statements of the parties as to the nature of the relief sought, and the theory upon which it was based. The living daughter was the moving party in both proceedings, and throughout both proceedings primary emphasis was placed by her attorney upon the incompetent's condition, her relatively small needs, the degree of care she was receiving, the fact that she had made no will, that the living daughter and the children of the deceased daughter would at her death be the incompetent's only heirs and distributees, and that they asked to be given now, without awaiting the incompetent's death, a portion of the property in which in any event they would ultimately share. No other considerations justifying the distribution were seriously suggested, and the

court's acceptance of these considerations is made plain by its orders, for these were the only considerations mentioned in the orders of distribution (R. 171–172, 286–287) or in the reports of the referees (R. 161–169, 271–282).

But, though it is apparent that the distributions which the court ordered were intended *pro tanto* to anticipate the distribution of the incompetent's estate at her death, it is equally apparent that in ordering them the court was pursuing no purpose of its own, but one which it found would have motivated the incompetent herself if she had been competent. The orders recite with particularity "that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property" (R. 172).[6] Such language, immediately following in each instance a recital of considerations pertinent only to a death motive, can leave no doubt that the court attributed to the incompetent a motive to make distributions in anticipation of her death, and in substitution for a testamentary disposition.

[6] The quotation in the text is from the first order. Substantially identical language appears in the second order (R. 287).

4. The transfers here involved, being motivated by a purpose to make a substitute for a testamentary disposition, are transfers made "in contemplation of death" within the meaning of Section 302 (c)

The petitioner's case rests primarily on a contention that in order to bring the transfers in question under the operation of Section 302 (c) of the Revenue Act of 1926, as amended, it is necessary for the Government to ascribe to the state court an intention to make a testamentary disposition which would have been beyond its power. As we have said, we ascribe no such intention to the state court. We have endeavored to show that, though the state court would have been without power to make a testamentary disposition of the incompetent's property, it could with perfect propriety—and in this case did—order a transfer in contemplation and anticipation of the incompetent's death, upon a finding that the incompetent would herself have made such a transfer if competent; and we have pointed out that, in any event, its action in so doing is now beyond question. The only important issue now presented is whether the transfers which the state court in fact made were transfers in the nature of substitutes for testamentary dispositions. Since they were, they are within the operation of Section 302 (c), whose impact is not confined to strict testamentary dispositions. Both courts below correctly accepted our view in this respect; and we submit that the petitioner's

argument to the contrary reflects a misapprehension of the scope of the federal taxing statute.

Broadly speaking, the effect of Section 302 (c) is for estate tax purposes to assimilate to testamentary dispositions all such *inter vivos* gifts as are made with the same motives as generally lead to testamentary dispositions. Thus, in *United States* v. *Wells*, 283 U. S. 102, 116–117, it was said:

> The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, *ante*, p. 15 [283 U. S. 15]. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition.[7]

United States v. *Wells* is the leading case on the subject, and its doctrine has been reflected in numerous decisions of the Circuit Courts of Appeals and the Board of Tax Appeals. See, e. g., *Updike* v. *Commissioner*, 88 F. 2d 807, 810 (C. C. A. 8th), certiorari denied, 301 U. S. 708; *Purvin* v. *Commissioner*, 96 F. 2d 929, 932 (C. C. A. 7th);

[7] *United States* v. *Wells* involved Section 402 (c) of the Revenue Act of 1918, which was similar in pertinent respects to Section 302 (c) of the Revenue Act of 1926, as amended.

First Trust & Deposit Co. v. *Shaughnessy,* 134 F. 2d 940, 942 (C. C. A. 2d), certiorari denied, 320 U. S. 744; *Kroger* v. *Commissioner,* — F. 2d — (C. C. A. 6th, decided December 4, 1944); *Iglehart* v. *Commissioner,* 28 B. T. A. 888, 901, affirmed, 77 F. 2d 704 (C. C. A. 5th); *Neal* v. *Commissioner,* 16 B. T. A. 1058, affirmed, 53 F. 2d 806 (C. C. A. 8th); *Green* v. *Commissioner,* 6 B. T. A. 278, 280. Applicable Treasury regulations are in accord. See Article 16 of Treasury Regulations 80 (1937 ed.), as amended by T. D. 4966, 1940-1 Cum. Bull. 220, which provides, among other things, that—

> A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death.

It is thus clear that a transfer taking immediate effect and having all the indicia of a gift *inter vivos* may nevertheless fall within the statute if the dominant or controlling motive is to achieve a substitute for testamentary disposition. In many cases, of course, ascertainment of any single controlling motive may be beset with great practical difficulty; as Mr. Justice Stone said, dissenting in *Heiner* v. *Donnan,* 285 U. S. 312, 342:

> He [the donor of property] may not, and often does not, analyse his motives or determine for himself whether his dominat-

> ing purpose is to substitute the gift for a testamentary disposition which would subject it to the tax * * *.

With respect to transfers made by the decedent within two years prior to his death, this practical difficulty is met in part by the rebuttable presumption [8] contained in the last sentence of Section 302 (c) as amended. But even in cases where this presumption is inapplicable, the burden still lies upon the petitioner, if it would avoid the tax, to establish as a dominating purpose the existence of what may be termed a "life purpose", as distinct from a "death purpose" or purpose to effect a substitute for a testamentary disposition. For when, as here, the Commissioner in his notice of deficiency (R. 381–384) and in his rejection of claim for refund (R. 385–386) has specifically determined that the transfers in question were made in contemplation of death, the presumption of correctness which attaches to his ruling requires that the petitioner establish by a preponderance of the evidence not merely that other motives may have entered into the making of the transfers—for the statute does not confine itself to transfers made solely "in contemplation of death" [9]—but rather that a pos-

[8] Restored from earlier tax acts after the conclusive presumption originally contained in the 1926 Act was held unconstitutional in *Heiner* v. *Donnan*, 285 U. S. 312.

[9] See I Paul, Federal Estate and Gift Taxation, Sec. 6.05, p. 251, n. 4. Cf. *Helvering* v. *Stock Yards Co.*, 318 U. S. 693, 699.

itive life motive actuated the transaction and that "contemplation of death" formed no substantial part of the decedent's motivating purpose. *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940, 941; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582; *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851, 854 (C. C. A. 4th); *Kroger* v. *Commissioner*, — F. 2d — (C. C. A. 6th, decided December 4, 1944).[10] If the evidence fails to establish the absence of a substantial death motive, or at the best merely establishes a mixture of motives from which it cannot be said affirmatively that no substantial death motive actuated the transaction, then the Commissioner's determination must stand.

Here, the case for sustaining the determination of the Commissioner is, we submit, even stronger.

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[10] Some of the cases cited in the text involved the two-year presumption; but this circumstance can have no bearing on the substantive question as to the nature and significance of the "life motive" which the claimant must in any event establish if tax is to be avoided.

The view stated in the text is likewise supported by decisions of the state courts. See, e. g., *Dommerich* v. *Kelly*, 132 N. J. Eq. 220; *Sellinger's Adm'r* v. *Reeves*, 292 Ky. 114, 119; *In re Hartford*, 122 N. J. Eq. 489, 491; affirmed *sub nom. Hartford* v. *Martin*, 120 N. J. Law 564, affirmed, 122 N. J. Law 283. See also *Estate of Boole*, 98 Cal. App. 714, 722.

Not only did the petitioner fail totally to adduce evidence supporting the existence of a life motive and the absence of a substantial death motive; the records in the state court proceedings and the findings of the state court based thereon establish affirmatively the existence of a dominating motive, attributed to the incompetent, to distribute a portion of her property during her lifetime in anticipation and contemplaton of her death, and in substitution for the devolution which would occur at her death (see pp. 21–29, *supra*). If, as a matter of law, the transfers made by the state court are properly to be regarded as transfers by the decedent within the meaning of the federal act (see pp. 37–42, *infra*), it must follow that the courts below correctly held that the Commissioner's determination was not to be disturbed.[11]

While the foregoing discussion relates primarily to the allowances made to the surviving daughter and the guardian of the three infants, similar considerations, we believe, call for affirmance of

[11] The discussion in the text is of course inapplicable to the first $6,000 of the annual allowances made to the surviving daughter and the guardian of the three infants, as well as to the first $500 of the allowance made to Lucy Hall Ferris, one of the decedent's sisters. These amounts were excluded from the gross estate by the District Court, on the ground that, representing as they did mere continuations of allowances made by the incompetent prior to her incompetency, they derived from a clearly established life motive (R. 399). The Commissioner did not appeal this aspect of the District Court's order, and no question with respect thereto is now in dispute.

the District Court's action with respect to the allowance to the brother and sisters of the decedent. These allowances concededly rest on a somewhat different basis, since the decedent's brother and sisters were not among the class of persons upon whom the incompetent's estate would in any event devolve. Except for the first $500 of the annual allowance to Lucy Hall Ferris (see footnotes 2 and 11, *supra*), the District Court included these allowances on the ground that no such allowances had theretofore been made by the incompetent prior to her incompetency, so that there was no basis for inferring the existence of a "life motive" (R. 396). While, as the Circuit Court of Appeals pointed out (R. 441), these allowances, unlike those to the daughter and grandchildren, could not have been substitutes for the devolution of the incompetent's property which would in any event have occurred upon her death intestate, they were on the other hand not shown affirmatively to have sprung from any motive disassociated from the contemplation of death. As with the allowances to the daughter and grandchildren, they involved property which was beyond any power of the donor to enjoy personally, and even beyond her individual power of disposition. Moreover, though the record in the first state court proceeding, in which these allowances were ordered, disclosed a basis for them in the need of the recipients, it failed to disclose any inclination on the

part of the incompetent, prior to her incompetency, to provide for permanent or regular alleviation of that need. While, therefore, like the Circuit Court of Appeals (R. 441), we entertain less confidence with respect to these allowances, we believe that the petitioner has failed to meet the burden of proof of establishing that the Commissioner had incorrectly determined them to have been made in contemplation of death, and that the District Court correctly included them in the decedent's gross estate.

5. The transfers made by the state court were transfers made by the decedent within the meaning of Section 302 (c)

Even assuming that the allowances in question were properly held to have been made "in contemplation of death" within the meaning of Section 302 (c), the petitioner contends that they were not transfers made by the decedent, as required by the section, for the reason that they were not made by her, but by the state court. This contention was disposed of summarily by the court below, in the following language (R. 437–438):

> The payments at bar were not made by the decedent, so that literally, the words do not apply. Nevertheless, the property was transferred, for the law gave the judges power to transfer it. The first question therefore is whether we should hold that the section covers such payments in case they are made "in contemplation of death," a

> question which we may reserve for the moment. We are satisfied that the proper construction of the section is as though it read: "any interest * * * of which at any time a transfer has been made from the decedent in contemplation of death." We have no doubt that if Congress had been faced with a situation like that before us, it would have included payments made by the court out of the property of an incompetent; to hold otherwise would be to frustrate the plain purpose of the section.[12]

We submit that this is the correct construction of the statute. The petitioner's proposed literal construction would leave these transactions in a vacuum; the purpose of the statute would fail as to them. The only justification which the petitioner suggests for thus construing the statute is the rule of thumb that taxing statutes must be strictly contrued against the Government and in favor of the taxpayer. But, as was said by this Court in *White* v. *United States*, 305 U. S. 281, 292:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be

[12] It does not appear that the dissenting judge in the court below disagreed with the view of the majority on this point; his dissent is directed at the "fiction" of assuming that the incompetent could have any such "contemplation of death" as that envisaged by the taxing act (R. 442–444).

> abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

As a matter of fact, the rule of strict construction has never found application where to apply it would have defeated the purpose of Congress. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Graf Distilling Co.*, 208 U. S. 198; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916, 923, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582. Sight should never be lost of the fact that "The key to the proper interpretation of the act of Congress is its policy and purpose." *Mercantile Bank* v. *New York*, 121 U. S. 138, 154. Congress could not have been expected specifically to deal with this particular situation where it appears that the general language of the statute is entirely sufficient to cover it. The construction of the statute for which the petitioner contends leads to the absurd result of insulating against estate tax interests which, within the ordinary meaning of the words of the statute, are interests "of which the decedent has * * * made a transfer, * * * in contemplation of * * * his death * * *." For, ordinarily, a thing is deemed to be done by a person if it is done for him pursuant to the exercise of authority which

binds him to the consequences. Literal and restrictive construction is to be avoided if a reasonable interpretation can be given to the statute consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354.

Moreover, the rule of strict construction is not violated by permitting words of the statute to have their full meaning or the more extended of two meanings. The words are not to be bent, but to be taken in the sense that will best effectuate the legislative intent. *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 90–91; *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344. Here, the purpose of Congress in imposing the tax upon transfers at death was to prevent evasion by including all *inter vivos* transfers which, in their very nature, were mere substitutes for testamentary dispositions. Prominent among such potentially evasive transfers are outright transfers, whether in trust or otherwise, made in contemplation of the decedent's death. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken v. United States*, 283 U. S. 15, 20; *United States* v. *Wells*, 283 U. S. 102, 116–117. There is no good and sufficient reason for applying a rule of strict construction here; rather, the contrary is true. The very reason for the enactment of Section 302 (c) was to avoid the consequences of a literal approach to the administration of the federal estate tax; and as this Court recognized in *United States*

v. *Wells, supra,* flexibility in construction of the section is essential if the congressional intent is to be effectuated. To the same end in many other contexts statutes have been construed to encompass things and transactions which were not within the literal meaning of their words and phrases.[12] A similar approach is entirely fitting here.

Surely no one would contend that, had the decedent herself given a general power of attorney to another to deal with the property, a transfer by such attorney made because of the imminence of the decedent's death should be held beyond the reach of the statute. Cf. *United States* v. *Giles,* 300 U. S. 41, 48–49. The petitioner (Br. 14) protests this analogy, on the ground that the basis of the state

[12] See, e. g., *Helvering* v. *Hammel,* 311 U. S. 504, where no distinction was drawn between a forced sale and a voluntary one made by the taxpayer; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & M. R. Co.,* 279 U. S. 732; *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136; *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112, holding that the constructive receipt of income constitutes the receipt thereof. For other applications of the principle, see, e. g., *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84; *Herbert* v. *Shanley Co.,* 242 U. S. 591; *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191; *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, 329; *United States* v. *Corbett,* 215 U. S. 233; *United States* v. *Giles,* 300 U. S. 41; *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U. S. 344; *United States* v. *Chavez,* 228 U. S. 525; *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501; *Worth Bros. Co.* v. *Lederer,* 251 U. S. 507; *Pauly* v. *State Loan & Trust Co.,* 165 U. S. 606; *McDonald* v. *Dewey,* 202 U. S. 510; *Pressed Steel Tank Co.* v. *Commissioner,* 133 F. 2d 776 (C. C. A. 7th).

court's power to dispose of the incompetent's property is not contractual, and does not derive from the incompetent, but flows directly from the sovereign. This, we submit, is a distinction without a difference. The vital thing is the result of the exercise of the power and not the method by which it was created. The power is inherent in the court only because of the law which vests it in the court. In a very real sense, the law constitutes the courts the agents of the incompetent, for they are empowered to act for him and to do only those things which he could and would have done in respect of his property had he remained competent. In the exercise of such powers the courts are not in any sense arbiters of the rights of contending parties, but conservators of the incompetent's property. As such, they stand in the shoes of the incompetent no less than does the attorney in fact. The question is not how the court acquired the power to make transfers of the incompetent's property, but whether the exercise of that power accomplished the sort of transfer which Congress intended to tax. Since it did, the fact that it was accomplished through the instrumentality of the court, rather than through an attorney in fact, is of no consequence.

We therefore submit that no violence is done to the "contemplation of death" provision of the statute by so construing it as to bring the transfers here within its ambit.

CONCLUSION

For the reasons stated the decision of the court below should be affirmed.

Respectfully submitted,

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DECEMBER, 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) [as amended by Sec. 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of

a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

New York Civil Practice Act (Cahill, Seventh Edition):

SEC. 1356. *Jurisdiction of supreme court; concurrent jurisdiction of county court.* The jurisdiction of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article. (Code Sec. 2320, in part.)

SEC. 1357. *Duty of court having jurisdiction.* The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family. (Code Sec. 2321.)

SEC. 1383. *Death of incompetent; duty of committee.* Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, shall render to the court by which he was appointed a final account of his proceedings touching the property of the incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. (As amended by L. 1935, ch. 724, September 1. Code Sec. 2344, in part.)

U. S. GOVERNMENT PRINTING OFFICE : 1944

SUPREME COURT OF THE UNITED STATES.

No. 294.—October Term, 1944.

City Bank Farmers Trust Company, formerly known as The Farmers Loan and Trust Company, as Administrator, etc., Petitioner, vs. George T. McGowan, Collector of Internal Revenue for the Twenty-eighth Collection District, New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 29, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents an issue of importance arising under § 302(c) of the Revenue Act of 1926, as amended,[1] which requires inclusion, in the gross taxable estate of a decedent, of any interest in property of which the "decedent has at any time made a transfer . . . in contemplation of . . . his death, ..." More specifically, the inquiry is whether the section reaches allowances out of the income of an incompetent person.

Helen Hall Vail died in 1935 intestate. For nine years she had been incurably insane. In 1926 an adjudication of incompetency was entered by the Supreme Court of the State of New York, and a committee was appointed to care for her property, which consisted of income-producing realty and personalty. In addition, she was in receipt of the income of a trust. During the period of five years prior to the adjudication her annual income from all sources had averaged $300,000. She was over 70 years of age but in good physical health. She had a living daughter and three grandsons, children of a deceased daughter. Application was made to the court to make allowances out of income to Mrs. Vail's issue and to a brother and sisters. The court referred the matter to a referee before whom it was shown that she had, over a period of years, allowed each of her daughters $6,000, and one of her sisters $500, per annum, and had made gifts to her

[1] Internal Revenue Code § 811(c), 26 U. S. C. § 811(c).

daughters, but not with regularity. As she was confined in an institution, her total needs, including maintenance and taxes, did not exceed $50,000 per annum. Accumulated income in the hands of the committee amounted to over $750,000.

The court, on the basis of the referee's report, entered an order which, after reciting that Mrs. Vail had made no will, that the daughter and grandchildren, or their issue, would, upon her death, be her only heirs at law and next of kin, and the only persons entitled to share in her estate, and that, if she were in possession of her mental faculties, "she would desire that the allowance hereinafter fixed be made . . ., and would make such allowance to such persons out of her property", directed the committee to pay yearly, in quarterly installments, $50,000 to the living daughter and $50,000 to the guardian of the children of the deceased daughter; $2,000 each to all but one of the brother and sisters; and $3,000 to the remaining sister.

Some six years later an application was made for an increase in the allowance. The matter was again referred for hearing and, on the coming in of the referee's report showing that accumulated income in Mrs. Vail's account had increased to over $1,000,000, that income had averaged, for over five years, approximately $395,000 per annum, and, after paying allowances and all expenses, the surplus averaged about $191,000 a year, the court made an order reciting that she was then 77 years of age and incurable, enumerated the issue who would be entitled to her estate at death, that she had no will, and that if she were competent she would have desired that the sums named in the earlier decree be augmented, raised the allowances to the daughters and to the grandchildren collectively to $75,000, retroactive to the date of the original order. It was never claimed, and is not contended, that the next of kin needed any such allowances for their maintenance and support in their station in life. It is conceded that the brother and sisters to whom allowances were made were destitute and in need of maintenance.

At Mrs. Vail's death the allowances theretofore paid totaled $1,377,866.67. The Commissioner of Internal Revenue included the sum in the decedent's gross estate and determined a deficiency. The petitioner, as administrator, paid the sum demanded, claimed a refund and, on denial, instituted this action in the District Court. That court, upon consideration of the record of the pro-

ceedings in the Supreme Court of New York, found that the total of the allowances was properly included in the decedent's gross estate, except so much as represented annual payments to the daughter and the grandchildren's guardian of $6,000 each and $500 per annum of the gifts to collaterals, and entered judgment accordingly.[2] The Circuit Court of Appeals, by a divided court, affirmed the judgment.[3] We granted certiorari.

The Supreme Court of New York is empowered by statute to act as representative of the State, as *parens patriae*, in caring for the persons and the estates of its incompetent citizens. That court may grant allowances out of income only if it determines that the incompetent would probably have granted such allowances himself had he been sane. The court does not, in any proper sense, act as the incompetent's agent. In the exercise of the power the primary consideration is that the incompetent's property shall not be wasted but preserved against the possibility of restoration to sanity. On these propositions the parties are in accord.

The petitioner urges that the present case is not within the terms of the statute and that, in enacting § 302, Congress did not contemplate any such contingency as that here involved. It insists that Mrs. Vail made no transfer but, if any was made, the court made it; that she had and could have no motive in respect of the gift. In addition, it urges that, under the State law, the court's control over the estate ceases at the incompetent's death, and the court cannot make a will for her or in any wise interfere with the devolution of her estate. Hence, it concludes that to suggest the court sanctioned transfers of a testamentary character is to assume that it exceeded its powers. Such an assumption, so petitioner says, ought not to be indulged. On the contrary, it should be presumed that the court acted within its granted powers; that is, authorized transfers *inter vivos*, with no testamentary motive.

The Government, on the other hand, takes the position that nothing in the law of New York, and no authority cited by the petitioner, precludes the State court from making an allowance in contemplation of death if, upon the record made, the court, placing itself in the incompetent's position on the supposition that she were sane and competent, concludes that she would have made

[2] 43 F. Supp. 790.

[3] 142 F. 2d 599.

the transfers. And, it adds, that what was done by the Supreme Court in this case was not appealed and is now beyond correction, if erroneous, and that the records and orders evince an understanding that the certainty of continuance of disability until death, the fact of intestacy, and the natural expectations of the distributees under the intestate laws were prevalent factors in moving the court to make the orders in question, and characterize the court's action as taken in contemplation of death. The Government says that, as the court was required to, and did, act as the decedent would have acted if competent, this case is not outside the terms of § 302(c) but, on the contrary, in contemplation of law, the decedent did make the transfers in question.

The issue is a narrow one. Literally Mrs. Vail neither made the transfers nor did she have any motive with respect to them. But a court stood in her place and unquestionably had the function of effectuating a transfer of her property and of determining what motive or purpose would have actuated her had she been competent to act. It seems to us that it is sticking in the bark to say that, in the circumstances, the transfers are not within the section because Congress did not add a phrase to the effect that where a court made the transfer, acting in lieu of the incompetent owner, such a transfer should be governed by the statute.

We hold, therefore, that where, as in New York, the court is to substitute itself as nearly as may be for the incompetent, and to act upon the same motives and considerations as would have moved her, the transfer is, in legal effect, her act and the motive is hers.

This being so, the only remaining question is whether the proof was sufficient to overcome the presumption arising from the Commissioner's determination that the transfers were made in contemplation of death. The applicable test is that stated in *United States* v. *Wells*, 283 U. S. 102. This is whether the thought of death is the impelling cause of the transfer. As respects the descendants of Mrs. Vail, it would seem clear enough that there was no dominant motive for the transfer other than the thought that, as they would inherit her estate, and as there was a large accumulation of unneeded income, they might as well receive substantial portions now as await her death to enjoy their inheritance. The fact that these beneficiaries did not stand in need of the money, the fact that the increase granted at the

second hearing was made retroactive, and that the past instalments were paid in a lump sum, the arguments of counsel in both hearings that the only reason for granting the allowances to Mrs. Vail's descendants was that they inevitably would divide her estate amongst them, and the recitals of the court orders, to which reference has been made, all go to confirm, rather than to undermine the Commissioner's determination.

We think the District Court was right in holding that, to the extent of $6,000 per annum, which was the sum Mrs. Vail, when competent, had regularly allowed each of her daughters, the transfers fall without the terms of § 302(c), but that the balance of the payments to her descendants falls within its sweep.

A different question is presented respecting the allowances to collaterals. It appears that they were in need of funds for their maintenance and support, and it is obvious that no payments to them could be on account of any share of their sister's intestate estate. The allowances have the color of current payments for support and they were authorized because the court concluded that, if sane and cognizant of the situation, Mrs. Vail would have made them. These considerations lead to the conclusion that the Commissioner's determination concerning them is rebutted and that they should not have been included in the decedent's gross estate. To the extent indicated the judgment of the Circuit Court of Appeals is reversed.

So ordered.